

# Oklahoma Law Review

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Volume 57 | Number 2

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1-1-2004

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### Recommended Citation

Jodi M. Warmbrod, *Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather than Go for an Antitrust Challenge to the Bowl Championship Series*, 57 OKLA. L. REV. 333 (2004), <https://digitalcommons.law.ou.edu/olr/vol57/iss2/5>

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## Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go For an Antitrust Challenge to the Bowl Championship Series\*

### I. Introduction

Against the backdrop of bowl game traditions and several failed attempts to pair the top two teams in a championship game, the Bowl Championship Series (BCS) emerged in 1998 to address college football fans' deep-seated frustration with the lack of a true national championship game.<sup>1</sup> The BCS arrangement encompasses four<sup>2</sup> bowl games whose participants are primarily selected from sixty-three universities within certain conferences,<sup>3</sup> leaving the

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\* The author would like to thank Dean Andrew M. Coats, C. Brent Dishman, and Professors D. Kent Meyers, Mary Margaret Penrose, and Carrie Sperling for their helpful comments on earlier drafts. The author would also like to dedicate this comment in memory of her father, Gary Warmbrod, who loved college football.

1. See *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 10 (2003) (testimony of Jim Delany, Commissioner, Big Ten Conference) [hereinafter *Delany House Testimony*] (noting that the BCS was created in 1998 to strengthen the bowl system); *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 11 (2003) (statement of Jim Delany, Commissioner, Big Ten Conference) [hereinafter *Delany House Statement*] (arguing that without the BCS, college football fans would have been denied a true national championship game under the previous bowl game structure of conference-bowl relationships). The National Collegiate Athletic Association (NCAA) does not sponsor a Division I-A national championship in college football. See *infra* Parts II.A-B.

2. The BCS recently added a fifth BCS bowl game to its postseason structure; the new structure will go into effect after the 2006 regular season. Calvin Watkins, *As Expected, BCS Adds Bowl — Planned Fifth Game Would Rotate Between Four Current Sites*, DALLAS MORNING NEWS, June 11, 2004, at 10C. This change to the BCS will not alter the current bowl locations, with the Fiesta, Orange, Rose, and Sugar Bowls continuing to host the BCS bowl games. *Id.* Under the new format, each of the four BCS bowls will host two games once every four years, with the first game being its regular game and the second game being the national title game. *Id.*; see also Mark Alesia, *TV Will Get Final Say on New BCS Lineup: Major Bowls Will Host Extra Game Once Every Four Years, Title Game Is One Week Later*, INDIANAPOLIS STAR, June 11, 2004, at 1D (noting that the current changes to the BCS system happened after the non-BCS schools formed a coalition and threatened an antitrust lawsuit).

3. See BOWL CHAMPIONSHIP SERIES: BCS BOWL ELIGIBILITY, at <http://www.bcsfootball.org/index.cfm?page=eligibility> (last visited Aug. 30, 2004) [hereinafter *BCS BOWL ELIGIBILITY*] (noting that the conference champions of the BCS conferences — Atlantic Coast Conference (ACC), Big East Conference, Big Ten Conference, Big Twelve Conference (Big 12), Pacific-10 Conference (Pac-10), and Southeastern Conference (SEC) — have guaranteed berths to BCS

other fifty-four universities in Division I-A without the opportunity to compete for the BCS-proclaimed national title.<sup>4</sup> BCS membership advantages, however, extend beyond determining a national champion. BCS universities automatically qualify for the most sought after bowl games,<sup>5</sup> which are accompanied by lucrative television contracts with the American Broadcasting Company (ABC).<sup>6</sup> Moreover, BCS perks translate into financial, competitive, and branding benefits<sup>7</sup> for the BCS member schools — benefits that have drawn attention and concern from the U.S. Congress.<sup>8</sup>

Non-BCS universities — the “have-nots” of college football<sup>9</sup> — have increasingly cried foul and are ready to challenge the BCS arrangement with an antitrust lawsuit.<sup>10</sup> These universities contend that the BCS fails to provide

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bowls, thus filling six of the eight slots in the four BCS bowl games).

4. See *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 19 (2003) (statement of Scott S. Cowen, President, Tulane University) [hereinafter *Cowen House Statement*] (remarking that the BCS arrangement has created a “system of limited access” in Division I-A college football).

5. See *supra* note 3 (noting that the six BCS conference champions automatically qualify for positions in BCS bowl games).

6. *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 16 (2003) (statement of Scott S. Cowen, President, Tulane University) [hereinafter *Cowen Senate Statement*].

7. See *infra* Part II.F.

8. See Chris Dufresne, *Senate Probes BCS Format — Biden Says System “Looks Un-American;” Tulane President Says It Represents a Monopoly*, L.A. TIMES, Oct. 30, 2003, at D8 (quoting Sen. Joe Biden calling the BCS “un-American”). See generally *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 1 (2003) (statement of Sen. Orrin Hatch, Chairman, S. Comm. on the Judiciary) (commenting that the current BCS system calls basic fairness into question); *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 2 (2003) (statement of Rep. James F. Sensenbrenner, Chairman, House Comm. on the Judiciary) (explaining that there are allegations that the current BCS system violates federal antitrust law); *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 2 (1997) (statement of Sen. Mike DeWine, Chairman, S. Subcomm. on Antitrust, Business Rights and Competition) (commenting that the “[Bowl] Alliance raises antitrust and competitive concerns that need to be examined”).

9. Joe Drape, *B.C.S. and Non-B.C.S. Teams Not So Different*, N.Y. TIMES, Sept. 15, 2003, at D7 (calling non-BCS schools the “have-nots” of college football). Non-BCS conferences include Conference USA, Mid-American Conference, Mountain West Conference, Sun Belt Conference, and Western Athletic Conference. *Cowen House Statement, supra* note 4, at 19.

10. *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 17

all Division I-A programs with equal access to postseason opportunities, resulting in a system that stifles competition and runs contrary to federal antitrust law.<sup>11</sup> The “haves,” or those conferences and schools belonging to the BCS,<sup>12</sup> argue that the system does not violate the Sherman Antitrust Act<sup>13</sup> but rewards those universities with the winningest traditions in college football.<sup>14</sup>

Utah Attorney General Mark Shurtleff has threatened to request that the Antitrust Committee of the National Association of Attorneys General conduct a formal investigation to determine whether the BCS arrangement restrains competition or harms consumers of college football.<sup>15</sup> Moreover, several sports writers and commentators support the non-BCS schools’ contention that the BCS violates federal antitrust law.<sup>16</sup> In this impending legal battle of big dogs and underdogs, this comment analyzes whether a viable antitrust claim against the BCS exists or if non-BCS schools should simply recognize and accept their place in the college football hierarchy. This comment concludes that non-BCS conferences and universities have confused

(2003) (testimony of Scott S. Cowen, President, Tulane University, and Chairman, Presidential Coalition for Athletics Reform) [hereinafter *Cowen House Testimony*] (commenting that consultations with antitrust legal counsel reveal that the BCS agreement is “vulnerable to violation of [the] antitrust laws if contested”).

11. *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 29 (2003) (testimony of Steve Young, NFL Super Bowl Championship Quarterback, and Former Division I-A College Football Player) [hereinafter *Young House Testimony*].

12. *Cowen House Statement*, *supra* note 4, at 25 (showing that the BCS includes the ACC, Big 12, Big East Conference, Big Ten Conference, Pac-10, SEC, and independent University of Notre Dame); Drape, *supra* note 9 (referring to BCS schools and conferences as the “haves” of college football).

13. 15 U.S.C. §§ 1-7 (2000).

14. *See Delany House Statement*, *supra* note 1, at 15 (noting that the BCS revenue structure rewards those teams that predominately played in major bowl games before the formation of the BCS).

15. Joe Drape, *B.C.S. To Explore a More Inclusive System*, N.Y. TIMES, Nov. 17, 2003, at D4.

16. *Interview: Christine Brennan Discusses the Various College Bowl Games* (National Public Radio broadcast, Jan. 2, 2004). When asked whether the BCS would pass muster under antitrust laws if college football was in any other industry, Ms. Brennan replied “[p]robably not” and commented that the BCS “may not even pass [the antitrust laws] in this industry.” *Id.*; *see* Tim Layden, *Better Bowls: The BCS May Never Be Perfect, but College Football Can Improve* (Oct. 17, 2003), at [http://sportsillustrated.cnn.com/2003/writers/tim\\_layden/10/17/insider/index.html](http://sportsillustrated.cnn.com/2003/writers/tim_layden/10/17/insider/index.html) (referring to Congress’s involvement in the legality of the BCS and commenting that “while there’s little doubt that the bowl system — under any name — flouts antitrust laws, it seemed that the government needn’t worry about it”).

athletic competition with economic competition, and that, although the time may have come to sideline the BCS system, the “have-nots” will not achieve victory through an antitrust lawsuit.

Part II of this comment tracks the history of the college football bowl system and the evolution of the BCS. Part III provides a brief introduction to the Sherman Antitrust Act and illustrates how college football and the BCS fall within the scope of the Act. Part IV uses the U.S. Supreme Court’s decision in *NCAA v. Board of Regents of the University of Oklahoma*<sup>17</sup> to illustrate the analysis that courts employ to determine unreasonable restraints of trade in college athletics. Finally, Part V demonstrates how a potential BCS antitrust claim would confuse athletic and economic competition and why a court would likely reject an antitrust challenge by non-BCS institutions against the BCS.

## *II. Who’s No. 1? The History of Postseason College Football*

Bowl games are inescapably tied to college football’s beginnings. Until the BCS began in 1998, however, no mechanism existed within the bowl game structure to determine one national champion.<sup>18</sup> The BCS ingeniously capitalized on this apparent flaw by pairing the historically powerful football conferences with the most coveted bowl games.

### *A. The Evolution of Bowl Games*

Bowl games existed over a century before the BCS. In 1894, Amos “Alonzo” Stagg invited the University of Notre Dame to play the University of Chicago in the first bowl game.<sup>19</sup> Shortly thereafter, other universities joined the bowl game phenomenon, including the University of Michigan and Stanford University, who played the first Rose Bowl game in 1902.<sup>20</sup> The

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17. 468 U.S. 85 (1984).

18. See *Delany House Statement*, *supra* note 1, at 11-13 (noting that bowl and conference affiliations were a step toward providing a national championship game for college football fans).

19. *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 41 (1997) (statement of Cedric W. Dempsey, Executive Director, NCAA) [hereinafter *Dempsey Senate Statement*].

20. *Id.* at 43 (noting that the first bowl games were anything but regular in postseason play). The second Rose Bowl game took place fourteen years later when Washington State University played Brown University. *Id.* Postseason play picked up during the Great Depression. There are estimates that over 100 postseason games were played nationwide to raise relief funds for the unemployed in response to U.S. President Herbert Hoover’s Committee on Mobilization of Relief Resources. *Id.* at 41-42.

bowl game tradition continued with the addition of the Orange, Sugar, Sun, and Cotton Bowls in the 1930s, as cities and universities realized the potential economic impact of bowl games and dedicated football fans.<sup>21</sup> Since then, the number of bowl games has increased. Currently, twenty-eight bowl games provide fifty-six Division I-A universities with an opportunity for postseason play.<sup>22</sup>

As bowl games became the status quo for postseason play, several conferences developed relationships with certain bowls to ensure the conferences' respective champions a berth in postseason play. The Big Eight Conference, now known as the Big Twelve (Big 12) Conference,<sup>23</sup> which includes both the University of Oklahoma and Oklahoma State University,<sup>24</sup> cultivated a close relationship with the Orange Bowl and sent its annual conference champion to Miami, Florida.<sup>25</sup> Other conferences established similar relationships, such as the Big Ten and Pacific Ten (Pac-10) champions securing an exclusive agreement to compete in the Rose Bowl each year.<sup>26</sup> While these relationships ensured certain conference champions a bowl game, they often prevented the best teams in the country from meeting in a national

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21. *See id.* at 44 (stating that the Orange and Sugar Bowls started in 1935, the Sun Bowl in 1936, and the Cotton Bowl in 1937). Currently, the Orange Bowl is played in Miami, Florida, the Sugar Bowl in New Orleans, Louisiana, the Sun Bowl in El Paso, Texas, and the Cotton Bowl in Dallas, Texas. 2003-2004 COLLEGE BOWL RESULTS, at [http://football.about.com/cs/bowlgames/a/bl\\_2003bowls.htm](http://football.about.com/cs/bowlgames/a/bl_2003bowls.htm) (last visited Aug. 30, 2004) [hereinafter 2003-2004 COLLEGE BOWL RESULTS].

22. *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 17 (2003) (statement of Keith R. Tribble, Chairman, Football Bowl Association) [hereinafter *Tribble Senate Statement*].

23. USA FOOTBALL, HISTORY OF COLLEGIATE FOOTBALL, at <http://www.usafootball.com/aboutthesport/collegiate.html> (last visited Aug. 30, 2004).

24. *Id.* The Big 12 Conference grew out of the Missouri Valley Intercollegiate Athletic Association (MVIAA), which formed in 1907. *Id.* In 1920, MVIAA admitted Oklahoma, and Oklahoma State joined in 1925. *Id.* In 1928, six of the seven institutions (excluding Oklahoma State) formally organized a separate conference that became known as the Big Six. *Id.* The league membership grew when Colorado and Oklahoma State joined the conference. *Id.* In 1968, the conference officially changed its title from MVIAA to the Big Eight Conference. *Id.* Finally, in 1996, the conference was renamed the Big 12 after the conference added Baylor, Texas, Texas A&M, and Texas Tech. *Id.*

25. *Delany House Statement*, *supra* note 1, at 12.

26. *Id.* (also noting that the SEC developed a longstanding relationship with the Sugar Bowl, and the former Southwest Conference sent its champion to the Cotton Bowl in Dallas, Texas).

championship game.<sup>27</sup> Consequently, the top two teams each year met only occasionally, and when they did, it was by mere chance.<sup>28</sup>

Because of the happenstance nature of a national championship game and the lack of a playoff mechanism to determine an undisputed national champion, Division I-A college football has historically relied on voting by selected members of the college football community to determine its national champion. Under this system, the Associated Press Poll and Coaches Poll each select a national champion.<sup>29</sup> This imperfect and highly subjective system has resulted in the crowning of two teams as national champions on

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27. See *infra* notes 28-31, 75-86 and accompanying text.

28. *Delany House Testimony*, *supra* note 1, at 10 (illustrating that before the first attempt to develop a bowl alliance, the conference bowl system paired the number one and two teams against each other only nine times in forty-five years).

Another interesting example of the irregularity in national championship games occurred in 1969 when U.S. President Richard M. Nixon declared the Division I-A national champion before postseason bowl play ever took place. See Pete Fiutak, *College Football's 100 Greatest Games: Texas v. Arkansas, 1969*, COLLEGE FOOTBALL NEWS, at [http://www.collegefootballnews.com/Top\\_100\\_Games/Top\\_100\\_Games\\_5.htm](http://www.collegefootballnews.com/Top_100_Games/Top_100_Games_5.htm) (last visited Aug. 30, 2004). On December 6, 1969, President Nixon attended the Arkansas-Texas regular season game intending to declare the winner of the game national champion. *Id.* At the time, the polls ranked Texas first and Arkansas second. *Id.* After Texas's 15-14 victory, President Nixon named Texas the national champion. *Id.*

29. See COLLEGE FOOTBALL DATA WAREHOUSE (RECOGNIZED NATIONAL CHAMPIONSHIPS BY YEAR), at [http://www.cfbdatawarehouse.com/data/national\\_championships/nchamps\\_year.php](http://www.cfbdatawarehouse.com/data/national_championships/nchamps_year.php) (last visited Aug. 30, 2004) [hereinafter COLLEGE FOOTBALL DATA WAREHOUSE] (showing the year each selector poll named a college football team national champion). Active since 1936, the Associated Press Poll is the oldest poll. *Id.* at [http://www.cfbdatawarehouse.com/data/national\\_championships](http://www.cfbdatawarehouse.com/data/national_championships). The Coaches Poll has existed since 1950. *Id.* The Coaches Poll has used different sources to report its poll over the years. *Id.* From 1958 through 1990, the Coaches Poll used United Press International (UPI). *Id.* From 1991 through 1996, USA Today/CNN reported the Coaches Poll selection. *Id.* The Coaches Poll has used USA Today/ESPN from 1997 to the present. *Id.*

With the BCS, both the Associated Press and Coaches Polls continue to select a Division I-A national champion. *Id.* at [http://www.cfbdatawarehouse.com/data/national\\_championships/year\\_by\\_year.php](http://www.cfbdatawarehouse.com/data/national_championships/year_by_year.php). However, under the current BCS contract, which expires after the 2005 season, the Coaches Poll is obligated by contract to declare the winner of the BCS title game the national champion. Chris Dufresne, *Coaches Backed into a Corner: An Agreement Requires That They Vote the Winner of BCS Title Game No. 1, but Some Are Asking If They Can Keep USC at the Top*, L.A. TIMES, Dec. 10, 2003, at D1. The Associated Press Poll, however, may name another team national champion. *Id.* For example, after the 2003 season, the Associated Press Poll named the University of Southern California national champion, while the Coaches Poll selected the winner of the BCS title game, Louisiana State University, national champion. Tracy Dodds, *New BCS Formula Emphasizes Human Vote*, INDIANAPOLIS STAR, July 16, 2004, at 1D.

more than one occasion.<sup>30</sup> The BCS appeared to resolve the problem of dual champions until the 2003 season when the Associated Press Poll and Coaches Poll selected different teams as national champion.<sup>31</sup> Thus, even with the BCS in place, the importance of the human polls has not diminished. In fact, recent changes to the BCS illustrate that the polls retain a substantial roll in deciding which teams play in the BCS-proclaimed national championship game.<sup>32</sup>

Critics of the human polls describe Division I-A college football as unique when compared to other intercollegiate athletics “because the National Championship is not decided by playing on the field, but rather by lobbying for the most votes in the two most recognizable ‘polls.’”<sup>33</sup> Despite its critics, however, human polls are justified in a nonplayoff system as long as the coaches and media vote based on the teams’ performance on the field, rather than subjective factors such as large fan bases and high profile coaches. Unfortunately, the system of having human polls name the national champion is neither the only peculiarity, nor critics only concern, in Division I-A college football.

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30. See COLLEGE FOOTBALL DATA WAREHOUSE, *supra* note 29 (illustrating when the various polls selected more than one college football team as national champion).

The 1970’s were plagued with dual champions. See *id.* In 1970, both Nebraska (Associated Press) and Texas (United Press International Coaches Poll) were named champions. See *id.* This occurred again in 1973 and 1974, when both Alabama and Notre Dame were selected in 1973, and Oklahoma and the University of Southern California were picked in 1974. See *id.*

The Associated Press and the United Press International Coaches Polls named the University of Colorado and Georgia Tech respectively as national champions in 1990. See *id.* In 1991, Miami (Florida) and Washington were both selected by the Associated Press and USA Today/ESPN Coaches Polls respectively. See *id.* Before the creation of the BCS, the most recent example was 1997, when Michigan and Nebraska were both selected as number one by the Associated Press and the USA Today/ESPN Coaches Polls respectively. See *id.*; see also MYTHICAL NATIONAL COLLEGE FOOTBALL CHAMPIONS, at <http://www.cae.wisc.edu/~dwilson/rsfc/history/1a.champs.txt> (last visited Aug. 30, 2004) (giving the year and the name of the college recognized as national champion). But see Dodds, *supra* note 29 (noting that after the 2003 season, the Associated Press Poll named the University of Southern California national champion, while the Coaches Poll named Louisiana State University national champion). However, 2003 is the only year there has been a split national champion since the advent of the BCS. See COLLEGE FOOTBALL DATA WAREHOUSE, *supra* note 29.

31. See Brian Davis, *New BCS Formula: Just Win, Baby*, DALLAS MORNING NEWS, Aug. 28, 2004, at 40G (noting that the Associated Press Poll voted University of Southern California national champion, while the Coaches Poll selected Louisiana State University national champion).

32. See *infra* notes 95-99 and accompanying text.

33. K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 SPORTS LAW. J. 57, 59 (1999).



*B. The Unconventional Role of the NCAA in Division I-A Postseason Play*

In the eyes of the National Collegiate Athletic Association (NCAA), the BCS and non-BCS label does not matter because these schools are all Division I-A universities.<sup>34</sup> When compared to other intercollegiate athletics, including other divisions of college football, however, the postseason bowl system is unique to Division I-A.<sup>35</sup> Senator Mitch McConnell contrasted the BCS with college basketball's national championships, a sixty-four-team tournament open to qualifying NCAA Division I-A schools, which is commonly referred to as March Madness.<sup>36</sup> According to Senator McConnell's analogy, unlike March Madness, which is a relatively fair and open competition, the Elite Eight and Final Four of college football are essentially determined before the start of the season.<sup>37</sup> Sports Illustrated writer David Vecsey also noted the discrepancy between NCAA's treatment of Division I-A college football and NCAA basketball:

The irony of the NCAA is how differently it approaches its two biggest national championships. Football is a members only elitist affair, while basketball is a model of democracy in which the best teams in the nation have to accept the challenge of all comers . . . . [In college basketball] [e]ventually some of those Cinderellas, say a Gonzaga, transform themselves into accepted members of high society. In football, however, that can't happen because it's a given fact that certain programs won't ever compete for a national title. Not because they can't, but because they aren't allowed to.<sup>38</sup>

No playoff system has ever existed for Division I-A college football,<sup>39</sup> which is contrary to other sports governed by the NCAA.<sup>40</sup> The NCAA

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34. John Klein, *Slices of BCS Pie Are Inequitable*, TULSA WORLD, Aug. 3, 2003, at B1.

35. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 88 (1984) (*Bd. of Regents III*) (commenting that the NCAA has sponsored and conducted national championships in some sports, such as baseball, swimming, basketball, wrestling, and track, but not in football); see also *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 5-6 (2003) (testimony of Myles Brand, President, NCAA) [hereinafter *Brand House Testimony*].

36. *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 9-10 (1997) (statement of Sen. Mitch McConnell) [hereinafter *McConnell Senate Statement*].

37. *Id.* at 9.

38. David Vecsey, *BCS Delights as Frogs Croak* (Nov. 21, 2003), at [http://sportsillustrated.cnn.com/2003/writers/david\\_vecsey/11/21/tcu.bcs/index.html](http://sportsillustrated.cnn.com/2003/writers/david_vecsey/11/21/tcu.bcs/index.html).

39. *Brand House Testimony*, *supra* note 35, at 5-6.

40. The NCAA is a voluntary organization composed of 1260 colleges, universities, athletic conferences, and related organizations. *Id.* at 5. In 1906, President Theodore Roosevelt

conducts, organizes, and oversees the national championships of every intercollegiate team sport except for Division I-A football.<sup>41</sup> In fact, the NCAA conducts eighty-nine national championships in twenty-three sports, including football playoffs in Division I-AA, Division II, and Division III.<sup>42</sup>

In addition to the NCAA's role of governance over all intercollegiate athletics,<sup>43</sup> the NCAA's relationship with the BCS consists of ensuring compliance with NCAA playing rules and administering, governing, and certifying bowl games.<sup>44</sup> The BCS participants are NCAA members, but each bowl game constitutes a private entity independent of the NCAA.<sup>45</sup> In essence, although the NCAA does not administer the Division I-A college football national championship, the NCAA maintains a "cooperative relationship," albeit not a legally binding arrangement, with the BCS.<sup>46</sup>

The U.S. Supreme Court's holding in *NCAA v. Board of Regents of the University of Oklahoma* best explains the motivation behind the NCAA's disparate treatment. NCAA President Myles Brand testified before the House

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initiated the discussions for the creation of an entity to govern intercollegiate sports after numerous injuries and deaths had resulted from college football, prompting many institutions to discontinue the sport. *Dempsey Senate Statement*, *supra* note 19, at 43. Sixty-two members founded the Intercollegiate Athletic Association of the United States (IAAUS), which was officially created March 31, 1906. HISTORY OF THE NCAA, at <http://www.ncaa.org/about/history.html> (last visited Aug. 30, 2004). In 1910, the IAAUS changed its name to the National Collegiate Athletic Association (NCAA). *Id.* Ironically, college football spearheaded the formation of the NCAA, yet Division I-A college football is the only team sport for which the NCAA does not determine the national champion.

41. NCAA ONLINE, at <http://www.ncaa.org/sportsfrontF.html> (last visited Sept. 6, 2004). Division I-A football is the only team sport where the NCAA does not conduct the national championship. *See id.*

42. *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 7 (2003) (statement of Myles Brand, President, NCAA) [hereinafter *Brand House Statement*]; *see* CHAMPIONSHIP INFORMATION — NCAA SPORTS.COM, at <http://www.ncaasports.com/football/mens/championship-info> (last visited Aug. 30, 2004) (containing championship information on Divisions I-AA, II, and III but omitting Division I-A from NCAA football championship information).

43. *Brand House Statement*, *supra* note 42, at 7 (noting that the "NCAA serves as the governance and administrative infrastructure through which representatives of colleges and universities enact legislation and set policy to establish recruiting standards and competitive equity among members, protect the integrity of intercollegiate athletics, ensure the enforcement of its rules and provide public advocacy of college sports").

44. *Id.* at 8.

45. *Dempsey Senate Statement*, *supra* note 19, at 45 (referring to the Bowl Alliance, the predecessor to the BCS).

46. *Id.* at 44 (referring to the NCAA relationship with the Bowl Alliance, which has now evolved to the BCS).

Judiciary Committee Hearing on the BCS that the NCAA's involvement in Division I-A football was "significantly diminished . . . when the U.S. Supreme Court ruled the NCAA's regular season television contract a violation of [the] Sherman [A]ntitrust [Act]."<sup>47</sup> *Board of Regents* altered the relationship between Division I-A college football and the NCAA when the Court held that the NCAA television plan restrained trade by restricting the right of any university to enter into its own television contract outside of the NCAA-established television plan.<sup>48</sup> Whether the NCAA's lack of involvement and trivial presence in the largest division of college football<sup>49</sup> stems from the fear of a future lawsuit is unclear. However, what is clear is that *Board of Regents'* monumental holding not only changed the NCAA's hands-on approach to Division I-A college football, but also provides direction in analyzing a potential antitrust suit against the BCS.<sup>50</sup>

Aside from the Supreme Court's decision in *Board of Regents*, the NCAA's minor involvement in Division I-A college football may also be attributed to the lack of support within Division I-A for an NCAA-sponsored playoff. As early as 1976, NCAA delegates introduced recommendations and proposals to establish a Division I-A football playoff similar to other NCAA-governed playoffs.<sup>51</sup> The 1976 playoff proposal, however, never came to a vote and was withdrawn for lack of support.<sup>52</sup> In 1988, an overwhelming majority of the NCAA delegates adopted a resolution indicating that Division I-A membership did not support a football playoff.<sup>53</sup> Nevertheless, a special committee selected to study the feasibility of an NCAA-run national championship revisited the issue again in 1994.<sup>54</sup> The committee decided not to recommend legislation to the NCAA Presidents Commission, even though the committee found merit to the concept of a playoff.<sup>55</sup> No playoff proposal

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47. *Brand House Testimony*, *supra* note 35, at 6 (referring to *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984)).

48. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984) (*Bd. of Regents III*).

49. See *Brand House Testimony*, *supra* note 35, at 5 (noting that Division I-A institutions are those schools with the broadest financial commitment to athletics); NCAA MEMBERSHIP BREAKDOWN, COMPOSITION OF THE NCAA, at [http://www1.ncaa.org/membership/membership\\_svcs/membership\\_breakdown.html](http://www1.ncaa.org/membership/membership_svcs/membership_breakdown.html) (last visited Aug. 30, 2004) (showing that Division I-A has 148,614 student-athletes out of the 361,175 total student-athletes in Divisions I, II, and III).

50. See *infra* Parts IV, V.

51. *Brand House Statement*, *supra* note 42, at 7.

52. *Dempsey Senate Statement*, *supra* note 19, at 44 (noting that there was no discussion of the idea on the NCAA convention floor).

53. *Brand House Statement*, *supra* note 42, at 8.

54. *Dempsey Senate Statement*, *supra* note 19, at 42, 44.

55. *Id.* at 44.

resulted, even after the panel forwarded the report to university presidents.<sup>56</sup> Thus, despite several opportunities to give the NCAA authority to conduct a national championship in college football, Division I-A universities have failed to adopt a playoff proposal.<sup>57</sup>

Proponents of the bowl game tradition proffer several explanations behind the hostility surrounding a playoff structure. First, they argue that compared to a playoff system, bowl games maximize the number of postseason opportunities for universities, student-athletes, and fans.<sup>58</sup> Under a playoff system, the number of student-athletes participating in postseason play would be reduced from more than 5600 student-athletes participating in twenty-eight bowl games to only 1600 student-athletes participating in a sixteen-team playoff system.<sup>59</sup> Second, opponents of a playoff system contend that college football playoffs might interfere with the academic missions of the universities.<sup>60</sup> To avoid conducting playoff games in the second semester, games would be squeezed into December, which would interfere with final examinations.<sup>61</sup> Third, some argue that a multigame Division I-A playoff might substantially harm the communities hosting bowl games.<sup>62</sup> Bowl organizations are nonprofit entities that not only sponsor football games, but

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56. *Id.*

57. *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 43 (2003) (statement of Myles Brand, President, NCAA).

58. *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 67-68 (2003) (statement of Harvey S. Perlman, Chancellor, University of Nebraska-Lincoln) [hereinafter *Perlman Senate Statement*].

59. *Id.* at 68. Currently, twenty-eight bowl games provide fifty-six universities the opportunity to participate in the postseason, whereas a playoff would likely reduce the number of universities taking part in the postseason to sixteen or fewer in a typical bracket structure.

60. *Id.* at 66-67. This argument is not necessarily true because the number of regular season games could be shortened to fit a playoff structure within the same time frame as the current bowl structure. See Mark Zeigler, *The Bowl Championship Solution* (Dec. 21, 2003), at [http://www.signonsandiego.com/sports/college\\_football/20031221-9999\\_1s21bcs.html](http://www.signonsandiego.com/sports/college_football/20031221-9999_1s21bcs.html) (proposing a playoff solution to the BCS, in which the regular season would have a maximum of eleven games per school, including any conference championship games).

61. *Perlman Senate Statement*, *supra* note 58, at 66. The student-athlete welfare argument is undercut, however, because universities already play bowl games in December. See Rick Alonzo, *FW Bowl Showdown Will Be Hard to Match; Game Features Teams with One Loss, Just Like BCS Championship*, DALLAS MORNING NEWS, Dec. 23, 2003, at 1C (noting that TCU refused to commit to the GMAC bowl because the date of the game conflicted with final exams in 2003).

62. *Perlman Senate Statement*, *supra* note 58, at 67.

also sponsor major events to showcase their respective local communities.<sup>63</sup> In addition, bowl games generate enormous economic benefits for their host cities.<sup>64</sup> Fourth, opponents of a playoff system contend that because college football determines the national champion based on play during the regular season, a playoff would diminish the importance of the regular season.<sup>65</sup> Finally, some argue that bowl games provide a unique experience for the student-athletes by allowing the athletes to enjoy the host city's attractions and participate in philanthropic events.<sup>66</sup>

Because of the strong opposition toward instituting a playoff structure, the unique history that bowl games have in Division I-A college football, and the failure of Division I-A to give the NCAA authority to conduct the national championship game, alliance advocates argue that some type of system must be in place to ensure an undisputed national champion. The BCS was intended to be that system.

### *C. Forming a "Members Only" Alliance*

In 1998, the BCS was born. Its official purpose was to give college football fans a national championship game.<sup>67</sup> The BCS as a concept, however, is not a new entity. Rather, the predecessor to the BCS began in the early 1990s as

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63. *Id.*; *Tribble Senate Statement*, *supra* note 22, at 95-97 (noting that bowl committees sponsor youth athletic endeavors, educational initiatives, scholarships, and a host of other charitable activities).

64. *Tribble Senate Statement*, *supra* note 22, at 95 (noting that the twenty-eight bowl games have roughly a \$1.1 billion dollar impact on host communities). By incorporating the bowl games into a playoff structure, however, this argument would fail because the bowl game communities would continue to play a vital role in the postseason.

65. *Perlman Senate Statement*, *supra* note 58, at 69. This argument relies on the assumption that fans would not pay as close attention to the regular season because the regular season would not matter with a playoff system. A playoff system that factors in a team's performance in the regular season for determining brackets, however, might alleviate this concern.

66. *Id.* at 67-68; *Tribble Senate Statement*, *supra* note 22, at 93-94. The legitimacy of this argument hinges on the assumption that the student-athletes will spend a greater amount of time in bowl cities than in playoff cities and that the student-athletes will participate in philanthropic events. See *Sports FYI: Falcons Hire Mora*, TULSA WORLD, Jan. 10, 2004, at B4 (noting that Kansas State University Coach Bill Snyder stripped quarterback Ell Roberson of his scholarship for the spring semester as well as his ring for participation in the Fiesta Bowl after Roberson was accused of sexually assaulting a woman the night before the bowl game and breaking team curfew rules).

67. *Delany House Statement*, *supra* note 1, at 11; BOWL CHAMPIONSHIP SERIES: ABOUT THE BCS, at <http://www.bcsfootball.org/index.cfm?page=about> (last visited Aug. 30, 2004) [hereinafter ABOUT THE BCS].

an effort to change the bowl game structure to pair the top two teams in a national championship game.<sup>68</sup>

The Cotton, Fiesta, Orange, and Sugar Bowls, along with their affiliated conferences, formed the Bowl Coalition in 1991.<sup>69</sup> While the Bowl Coalition attempted to match the top two teams in a national championship game, the agreement contained several flaws. First, the Orange, Sugar, and Cotton Bowls continued to host their respective affiliated conference champions, which ultimately prevented the Bowl Coalition from guaranteeing a national championship game.<sup>70</sup> For example, if the polls ranked former Big Eight Conference and Southeastern Conference (SEC) champions first and second, the affiliation agreements prevented the top two teams from playing each other because the SEC champion would go to the Sugar Bowl and the Big Eight champion would play in the Orange Bowl. Second, and more importantly, the Bowl Coalition consisted of only four conferences and Notre Dame,<sup>71</sup> thereby precluding the possibility of a true national championship game that would be open to all Division I-A schools.

The Bowl Alliance formed in 1995 as an attempt to cure the deficiencies of the Bowl Coalition.<sup>72</sup> This agreement between the Fiesta, Orange, and Sugar Bowls, along with several conferences,<sup>73</sup> allowed the pairing of conference champions, which was previously barred under the Bowl Coalition. The Bowl Alliance resulted in a true national championship game in 1995, when Nebraska and Florida, ranked first and second respectively, played for the national title in the Fiesta Bowl.<sup>74</sup> The remaining years of the Bowl Alliance, however, revealed its glaring imperfections.

In 1996, the Alliance snubbed BYU for an Alliance Bowl bid,<sup>75</sup> despite the school's number five national ranking and regular season record of 13-1, which was superior to that of nearly every team that received an Alliance bid.<sup>76</sup> Instead of receiving the recognition and payout of an Alliance Bowl,

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68. *Delany House Statement*, *supra* note 1, at 13.

69. Lafcadio Darling, Note, *The College Bowl Alliance and the Sherman Act*, 21 HASTINGS COMM. & ENT. L.J. 433, 437-38 (1999).

70. *Delany House Statement*, *supra* note 1, at 13.

71. *Id.*

72. *Id.*

73. *Id.* (explaining that the ACC, Big East, Big 12, and SEC composed the Bowl Alliance).

74. *Id.* Under previous conference arrangements, this game would not have occurred because Nebraska and Florida would have played in the Orange Bowl and the Sugar Bowl under the Big 12 and SEC conference affiliation agreements. *See id.*

75. *McConnell Senate Statement*, *supra* note 36, at 10.

76. *Id.* (pointing out that BYU's record was superior to four of the six teams who participated in the Alliance Bowls).

BYU settled for the Cotton Bowl.<sup>77</sup> Wyoming faced a similar fate.<sup>78</sup> Wyoming, with a higher winning percentage than three-fourths of the teams in postseason play, did not receive an invitation to any bowl, despite outranking the University of Texas,<sup>79</sup> which received an automatic bid to the Fiesta Bowl, an Alliance Bowl.<sup>80</sup> Not only were these teams denied the high visibility and high payout of an Alliance Bowl, but also the Bowl Alliance agreement denied the consumers of college football, namely the fans, the opportunity to see top performing Division I-A teams play in the top bowl games.<sup>81</sup>

Another glaring weakness of the Bowl Alliance was its incompleteness. While the Bowl Alliance excluded certain conferences and universities, others refused to join.<sup>82</sup> For example, the Big Ten and Pac-10 conferences continued to send their conference champions to the Rose Bowl.<sup>83</sup> This alignment prevented the Alliance from guaranteeing a national championship game if either of the top two ranked teams came from the Big Ten or Pac-10 conference.<sup>84</sup> In an attempt to correct this problem, the Alliance expanded to include the Big Ten and Pac-10 conferences along with the Rose Bowl.<sup>85</sup> Yet, the advent of the so-called "Super Alliance," like the previous Bowl Coalition

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77. *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 17 (1997) (statement of Sen. Craig Thomas).

78. *See id.* at 15 (noting that Wyoming was not invited to play in a postseason bowl game).

79. *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 30 (1997) (statement of Richard Peace, football player, University of Wyoming). Wyoming was ranked number twenty-two in the nation by both the Associated Press and Coaches Polls. *Id.* Despite ranking behind Wyoming as number twenty-three in only the Coaches Poll, Texas received an automatic bid to an Alliance Bowl because of conference tie-ins. *Id.*

80. TWO COUSINS COLLEGE FOOTBALL EMPORIUM, at <http://2cuz.com/champs/1996bcs.html> (last visited Aug. 30, 2004).

81. *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 14 (1997) (statement of Sen. Robert F. Bennett) (noting that the "Alliance system deprives fans of the playoff excitement and enthusiasm that is present in other NCAA sports, and in other NCAA football divisions").

82. *See Delany House Statement*, *supra* note 1, at 13 (noting that the ACC, Big East, Big 12, and SEC formed the Bowl Alliance, while the Big Ten and Pac-10 refused to join). The Bowl Alliance excluded the conferences currently classified as non-BCS conferences. *See id.*

83. *Id.*

84. *Id.* (explaining that the Bowl Alliance could not host the national championship team on four occasions between 1991 and 1997 for this reason).

85. Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, 10 SPORTS LAW J. 97, 105-06 (2003).

and Bowl Alliance, failed to create a true national championship game because it excluded other Division I-A teams from the agreement and, thus, from an opportunity to compete in the self-proclaimed national championship game.

The dissolution of the Bowl Alliance in 1997 provided the necessary impetus for creating the BCS. Unfortunately, somewhere in the transition the momentum to create a true national championship game petered out.<sup>86</sup> Accordingly, the BCS fails to address many of the flaws of the Bowl Alliance, and its set-up virtually mirrors previous alliance structures, leading some to call it “the heir of similar associations.”<sup>87</sup> As a result of these shortcomings, the failure to crown an undisputed national champion still plagues college football.<sup>88</sup>

#### *D. BCS: The Latest Attempt to Name a “National Champion”*

The BCS currently consists of four bowl games: the Fiesta, Orange, Rose, and Sugar Bowls.<sup>89</sup> These bowls rotate annually as the host venue of the BCS national championship game.<sup>90</sup> The respective member universities of six conferences and Notre Dame comprise the BCS.<sup>91</sup> The six conferences include the Atlantic Coast Conference (ACC), Big East, Big Ten, Big 12, Pac-10, and SEC.<sup>92</sup> Other bowl games not affiliated with the BCS host those teams that do not receive a coveted BCS bowl bid.<sup>93</sup>

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86. See Jack Carey, *Coaches Recommend Tweaks to BCS Format*, USA TODAY (Jan. 7, 2004), available at [http://www.usatoday.com/sports/college/football/2004-01-07-bcs-coaches\\_x.htm](http://www.usatoday.com/sports/college/football/2004-01-07-bcs-coaches_x.htm) (noting that both the University of Southern California and Louisiana State University were selected as national champions by the Associated Press Poll and Coaches Poll respectively after the 2003-2004 season).

87. Hales, *supra* note 85, at 103.

88. See *id.*

89. *Delany House Statement*, *supra* note 1, at 14; see *supra* note 2 (noting that the BCS will add a fifth bowl game after the 2006 regular season).

90. BCS BOWL ELIGIBILITY, *supra* note 3.

91. *Delany House Statement*, *supra* note 1, at 14; ABOUT THE BCS, *supra* note 67.

92. *Delany House Statement*, *supra* note 1, at 14.

93. See *id.* at 15 (noting that the BCS leaves the traditional bowl system in place because it does not eliminate other bowl games). Twenty-four bowl games are not affiliated with the BCS, including, among others, the Holiday, Independence, Sun, Liberty, Peach, Outback, and Cotton Bowls. 2003-2004 COLLEGE BOWL RESULTS, *supra* note 21.

For example, the Cotton Bowl, a former member of the Bowl Coalition, invites teams from the Big 12 and SEC once the BCS selection process is complete. SBC COTTON BOWL CLASSIC — LINEUP, at [http://www.swbellcottonbowl.com/ts\\_lineup.asp](http://www.swbellcottonbowl.com/ts_lineup.asp) (last visited Aug. 30, 2004) (noting that the Big 12 and SEC have a four-year agreement with the SBC Cotton Bowl, expiring in 2006, which requires the Big 12 to send their first team after the BCS selection and the SEC to send “a division champion, a division runner-up, a team with a comparable record,



The final BCS standings determine which two teams qualify for the national championship game as well as the other BCS bowl games. As a result of the 2003 regular season,<sup>94</sup> the BCS changed its ranking system to use three components, eliminating two of the previous components.<sup>95</sup> Beginning with the 2004 season, the BCS standings will be determined by three factors: (1) the USA Today/ESPN Coaches Poll, (2) the Associated Press Media Poll, and (3) a computer poll average.<sup>96</sup> Each component will count as one-third of a team's overall BCS score, which determines the final BCS standings.<sup>97</sup> The

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or a mutually-agreed upon team as the Big 12's opponent in the SBC Cotton Bowl").

94. See *supra* notes 29-31 and accompanying text (noting that the Associated Press and Coaches Polls selected two different national champions after the 2003 regular season).

95. See Davis, *supra* note 31 (illustrating how the BCS will formulate its weekly standings, which will be used to determine who plays in the national championship game); Bill Finley, *This Time, B.C.S. Tries an Easier Approach*, N.Y. TIMES, July 16, 2004, at D1 (commenting that the Associated Press Poll, Coaches Poll, and a combination of computer rankings will "each count for one-third of a team's total ranking"); BOWL CHAMPIONSHIP SERIES: BCS STANDINGS, at <http://www.bcsfootball.org/index.cfm?page=standings> (last visited Aug. 30, 2004) [hereinafter BCS STANDINGS] (noting that "[t]his year, the BCS standings will include three components: the rankings of the Associated Press media poll, the USA Today/ESPN coaches poll and a computer poll average").

Until the 2004 season, the BCS used five variables: (1) the subjective polls of the writers and coaches; (2) various computer rankings; (3) strength of schedule; (4) team record; and (5) quality wins versus the top ten ranked teams in the BCS standings. See Finley, *supra*. Voters in the Associated Press and USA Today/ESPN Polls, however, can still take the eliminated factors (schedule strength, team record, and quality wins) into account. Barry Jackson, *Not a Magic Formula*, MIAMI HERALD, Sept. 4, 2004, at 6D.

96. BCS STANDINGS, *supra* note 95 (discussing each of the three components). The new formula does not average the weekly rank of each team by the Associated Press and USA Today/ESPN Coaches Polls; rather, teams are evaluated on the number of voting points they receive in each poll divided by the total possible voting points for that particular poll. *Id.* The BCS formula will also use six computer rankings: Jeff Sagarin, who is published in *USA Today*; Anderson & Hester; Richard Billingsley; Colley Matrix; Kenneth Massey; and Dr. Peter Wolfe. *Id.* The computer rankings can range from 1-25; however, because a team's highest and lowest computer rankings are dropped when figuring a team's computer poll average, the maximum points for a team's computer poll average is 100 (4 computer polls  $\times$  25 maximum points). *Id.* Finally, the three components will be "added together and averaged for a team's ranking in the BCS standings." *Id.*; see also Finley, *supra* note 95 (noting that the computer ranking will no longer include the *New York Times* computer ranking).

97. As an example of the BCS ranking formula, suppose Oklahoma earns 1590 points out of a possible 1625 points in the Associated Press Poll for an average of .978 (1590/1625). In the Coaches Poll, Oklahoma earns 1465 out of 1525 points for a score of .961 (1465/1525). Out of 100 possible computer points, Oklahoma earns 94 for a score of .940. To calculate Oklahoma's BCS average, take the sum of .978, .961, and .940, and divide by three, which equals a BCS average of .960. George Schroeder, *The Formula*, DAILY OKLAHOMAN, July 16, 2004, at 3C.

two teams with the highest numerical average — those ranked first and second in the BCS standings<sup>98</sup> — will play in the national championship bowl game hosted by one of the four BCS bowls.<sup>99</sup>

The BCS contract<sup>100</sup> reserves six of the eight slots in the BCS bowl games annually for the champions of the six enumerated BCS conferences.<sup>101</sup> Accordingly, the BCS arrangement translates to guaranteed berths in high-payout bowl games<sup>102</sup> for the BCS conference champions. The other two slots, termed at-large positions, are open to any Division I-A school, including non-BCS schools, that has won at least nine regular season games and is ranked in the top twelve of the BCS final standings.<sup>103</sup>

The BCS arrangement clearly gives preferential treatment to BCS-affiliated universities, while offering only a small window of opportunity for a non-BCS school to break through to an elite bowl game.<sup>104</sup> Non-BCS universities can qualify for a BCS bowl game in two ways. First, a non-BCS school will automatically qualify for the BCS national championship game if it is ranked first or second in the final BCS standings.<sup>105</sup> Second, a non-BCS school will qualify for one of the two at-large positions in a BCS bowl game if that non-BCS team is ranked third through sixth in the final BCS standings.<sup>106</sup> Consequently, for a non-BCS school to qualify for a BCS bowl game, they must rank at the top of the Associated Press and Coaches Polls, as well as the computer rankings.

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98. BCS STANDINGS, *supra* note 95.

99. *Id.* (noting that the team with the highest average ranking will rank first in the BCS standings).

100. The BCS contract began with the 1998-1999 bowl season and goes through the 2005-2006 season. *See* ABOUT THE BCS, *supra* note 67.

101. BCS BOWL ELIGIBILITY, *supra* note 3 (“The conference champions of the Atlantic Coast, Big East, Big Ten, Big 12, Pacific-10 and Southeastern Conferences . . . are guaranteed berths.”). For example, the FedEx Orange Bowl hosts the national championship game in 2005. *Id.* The other three BCS bowls will use regional considerations for team selection, assuming the conference champion is not ranked first or second in the final BCS standings. *Id.* The Rose Bowl hosts the Big Ten and Pac-10 champions, the Fiesta Bowl hosts the Big 12 champion, and the Sugar Bowl hosts the SEC champion. *Id.*

102. *See infra* Parts II.E-F.

103. BCS BOWL ELIGIBILITY, *supra* note 3.

104. *Cowen House Statement*, *supra* note 4, at 19; *see infra* Part II.E.

105. BCS BOWL ELIGIBILITY, *supra* note 3.

106. *Id.*; *Delany House Statement*, *supra* note 1, at 14. Moreover, if one or more non-BCS teams other than Notre Dame qualify for the at-large selection pool, then Notre Dame will also qualify for an at-large position provided it is ranked in the top ten in the final BCS standings or has won at least nine regular season games. *Id.*

*E. BC Mess:<sup>107</sup> Critics Claim the BCS is Unfair*

Critics argue that while the BCS arrangement appears to be equally accessible and fair to all Division I-A universities, in operation, the system yields unfair results. In the five-year existence of the BCS, no school from outside of the six BCS conferences, even those finishing the season undefeated, has ever finished in the top six of the BCS standings or played in a BCS bowl.<sup>108</sup>

Tulane University provides a prime example of what critics claim is the reality of the BCS system. Despite Tulane being one of only two undefeated teams in the country,<sup>109</sup> the BCS denied the school a BCS bowl bid because Tulane did not attain the requisite ranking in the final BCS standings. Tulane failed to clinch a top six spot primarily because of its relatively weak schedule strength and lack of quality wins, which composed an important part of the BCS rankings before the recent changes. Critics of the BCS also point to other schools, such as BYU and Marshall in 2001, and Miami of Ohio, Boise State, and Texas Christian University (TCU) in 2003, that have also been denied BCS bowl bids despite outstanding regular seasons.<sup>110</sup>

Regardless of the inequities that result under the BCS system, BCS advocates find justification for the BCS arrangement in the pre-BCS history of conference relationships with certain bowl games. In the twenty years preceding the formation of the BCS, 159 of the 160 participants in the Fiesta, Orange, Rose, and Sugar Bowls were from BCS conferences, with the University of Louisville being the lone exception.<sup>111</sup> Louisville's recent jump

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107. Zeigler, *supra* note 60.

108. Cowen House Statement, *supra* note 4, at 22.

109. *Id.* at 18. The other undefeated team was the University of Tennessee, which won the national championship game in 1998-1999. *Id.*

110. *See id.* BYU finished the regular season 12-1 in 2001 with a better win-loss percentage than eight of the top ten BCS ranked teams. *Id.* Marshall University went 11-2 in 2001 and 2002, which in both seasons was a better record than eight of the ten schools ranked in the top ten of the BCS standings. *Id.* Both BYU and Marshall were unable to compete in a major bowl game because these schools are not members of the BCS and were not ranked in the top six of the final BCS standings. *Id.*

Before the recent changes to the BCS formula, certain BCS ranking components, such as strength of schedule and quality wins, hurt schools outside the six BCS conferences. For example, non-BCS teams belonging to weaker conferences could not rely on conference schedules to increase their strength of schedule standings. Despite the removal of these components from the BCS standings, there is nothing to prevent the pollsters from taking strength of schedule or quality wins into account. *See* Jackson, *supra* note 95.

111. *See* Pete Diprimio, *BCS vs. The Little Guys, A College Football Standoff* (Aug. 31, 2003), at <http://www.bayarea.com/mld/mercurynews/sports/6665080.htm>.

from Conference USA to the Big East bolsters the BCS's argument, with the previous bowl game participants now totaling one hundred percent. Because the six conference champions who have guaranteed access to BCS bowl games all had similar bowl assurances under preexisting conference relationships, the BCS alters little in the postseason arrangement from what has historically occurred.<sup>112</sup>

In the 2003 hearings before the House Judiciary Committee, Big Ten Commissioner Jim Delany argued that "without the guaranteed slots, [the BCS conferences] would not have participated in the BCS arrangement" and instead would have continued their preexisting relationships with the individual BCS bowls.<sup>113</sup> BCS schools further argue that non-BCS schools actually have more access to BCS bowl games because there are established rules for participation in these bowls that provide non-BCS schools the opportunity to compete in a BCS bowl game, something denied to those schools under the previous system.<sup>114</sup> In practice, however, these more inclusive rules have yet to benefit a single non-BCS school.

#### *F. The Spoils of War: Monetary Implications of the BCS*

Critics contend that by preordaining that six of the eight available slots *automatically* belong to BCS schools, BCS members enjoy an unfair competitive advantage over non-BCS schools.<sup>115</sup> By receiving automatic berths to highly visible, high-payout games, BCS conferences receive enormous revenue from the exclusion of non-BCS conferences because fewer conferences divide the BCS's financial pie.<sup>116</sup> Perhaps the financial aspect of the BCS best illustrates why non-BCS schools claim that the BCS is unfair.

The BCS derives revenue from its contracts with ABC Sports and the BCS bowl games.<sup>117</sup> Since the inception of the BCS, the sixty-three BCS schools have earned more than \$450 million from bowl appearances, which equates

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112. *Delany House Statement*, *supra* note 1, at 14.

113. *Id.*

114. See Dennis Dodd, *Notes: BCS vs. Non-BCS (Again)* (Aug. 21, 2003), at <http://www.sportsline.com/collegefootball/story/6578278> (arguing that before the BCS, the "have-nots" actually had less access to the major bowls, and that the BCS system provides stated rules for access to the BCS games for non-BCS schools and conferences).

115. See generally *Cowen House Statement*, *supra* note 4, at 19 (arguing that the BCS's inherent unfairness denies or limits the opportunities for other universities to earn the same rewards).

116. *Cowen House Testimony*, *supra* note 10, at 16.

117. BOWL CHAMPIONSHIP SERIES: REVENUE DISTRIBUTION, at <http://www.bcsfootball.org/index.cfm?page=revenue> (last visited Sept. 6, 2004) [hereinafter REVENUE DISTRIBUTION].

to roughly \$7 million per school.<sup>118</sup> In contrast, although a non-BCS school has never played in a BCS bowl, the fifty-four Division I-A, non-BCS schools have shared \$17 million, or about \$315,000 per school, from BCS distributions.<sup>119</sup>

Nevertheless, BCS advocates argue that the financial aspects of the current system rewards those schools who make the greatest commitment and contribution to college football.<sup>120</sup> However, critics contend that this argument is misleading and ultimately fails for three reasons. First, when given an opportunity to play, non-BCS teams have proven they can compete against the top-ranked teams from BCS conferences. At the start of the 2003 season, for example, non-BCS teams upset two ACC members when Georgia Tech lost to BYU,<sup>121</sup> and Northern Illinois beat then fourteenth-ranked Maryland.<sup>122</sup> Several weeks later, three teams from the non-BCS affiliated Mid-American Conference, Marshall, Toledo, and Northern Illinois, beat top BCS teams, Kansas State, Pittsburgh, and the University of Alabama, respectively.<sup>123</sup> These victories illustrate that BCS teams do not have a monopoly on great games and that, on any given Saturday, a non-BCS school can hold its own against a major BCS team.

Moreover, critics contend that college football does not comprise a homogeneous product — that is, one college football team is not necessarily interchangeable with another.<sup>124</sup> In essence, each football game featuring

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118. *Cowen Senate Statement*, *supra* note 6, at 16.

119. *Id.* (noting that \$17 million has been paid to fifty-four non-BCS universities over the life of the BCS thus far); REVENUE DISTRIBUTION, *supra* note 117 (noting that the BCS contributes over \$6 million per year to non-BCS Division I-A universities and also to Division I-AA conferences for the support of the “overall health of college football”). *But see Perlman Senate Statement*, *supra* note 58, at 70 (noting that “[w]hile the BCS generates significant revenues . . . , after the expenses of the participating teams are covered and money is distributed [to] . . . the participating conferences, the total distribution per institution is relatively small. Last year, . . . institutions in the Big 12 each received about \$1.2 million from the BCS arrangement. . . . By contrast, [they] generate \$2.5 million to \$3 million for every home football game [they] play.”).

120. *Delany House Statement*, *supra* note 1, at 15.

121. ESPN.COM COLLEGE FOOTBALL SCOREBOARD, at <http://sports.espn.go.com/ncf/scoreboard?season=2&week=2&confID=17> (last visited Apr. 12, 2004).

122. *Id.* at <http://sports.espn.go.com/ncf/scoreboard?season=2&week=28year=2003>.

123. *Id.* at <http://sports.espn.go.com/ncf/scoreboard?season=2&week=5&confID=4> (showing that on September 20, 2003, Marshall defeated then sixth-ranked Kansas State); *id.* at <http://sports.espn.go.com/ncf/scoreboard?season=2&week=5&confID=10> (showing that Toledo beat then eleventh-ranked Pittsburgh); *id.* at <http://sports.espn.go.com/ncf/scoreboard?season=2&week=5&confID=8> (showing that Northern Illinois upset the University of Alabama).

124. *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1299 (W.D. Okla. 1982) (*Bd. of Regents I*) (recognizing that “NCAA football is a unique product because of its history

certain Division I-A teams represents a different product, depending on the consumer.<sup>125</sup> While some consumers are attracted to a live or televised game between two powerhouse teams, most consumers are primarily interested in a particular game because they are “personally affiliated with one of the schools or because a team is affiliated with a local or regional college.”<sup>126</sup> For example, Navy alumni and fans would much rather watch a live or televised game between Navy and Army than one between Florida and Florida State. Thus, the argument that BCS schools make the greatest contribution to college football could easily be refuted by non-BCS schools’ fans because one college football game between certain universities is not necessarily substitutable with another.<sup>127</sup>

Finally, the argument that the BCS rewards those schools who make the greatest contribution to college football fails because some BCS conferences include teams that have not always been considered football powerhouses. Moreover, some football programs inclusion among the nation’s elite has been subsequent to joining a BCS conference.<sup>128</sup> For example, when Virginia Tech joined the Big East in 1991, its previous football record of 17-26-1 prevented it from playing in the ACC.<sup>129</sup> Ironically, Virginia Tech is now among the nation’s elite college football programs and recently left the Big East to join the ACC.<sup>130</sup>

Despite BCS schools’ proffered justifications for the revenue distributions, the revenue disparity has a substantial effect on non-BCS schools and their conferences. The de facto exclusion of non-BCS schools prevents these schools from obtaining the most lucrative bowl bids, which in turn hinders the schools’ overall mission by lowering athletic budgets and increasing athletic

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and tradition, the color and pageantry of the event, and the interest of college alumni in the football success of their alma mater,” and noting that “there is no other product readily substitutable for college football”); D. Kent Meyers & Ira Horowitz, *Private Enforcement of the Antitrust Laws Works Occasionally*: Board of Regents of the University of Oklahoma v. NCAA, a Case in Point, 48 OKLA. L. REV. 669, 676 (1996).

125. *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 92 (1997) (statement of Gary R. Roberts, Professor of Law and Sports Law Program Director, Tulane Law School) [hereinafter *Roberts Senate Statement*].

126. *Id.*

127. *Id.* (recognizing that college football differs from typical service or manufacturing industries in that one college football team is not necessarily interchangeable with another).

128. See Alan Dell, *USF Takes Bold Step in Affiliating with the Big East*, SARASOTA HERALD-TRIBUNE, Nov. 5, 2003, at C6 (using Virginia Tech as an example).

129. *Id.*

130. *Id.*

deficits.<sup>131</sup> Lower athletic budgets ultimately leads to difficulties in recruiting both student-athletes and coaches.<sup>132</sup> Moreover, inferior recruiting results in a less viable product; namely, a team that cannot compete against the traditional powerhouses of college football, which, in turn, impacts a school's fan base and ticket sales. For non-BCS schools, the fan base impact correlates to non-BCS fans knowing that their schools cannot "compete for a national championship no matter how well [they] do."<sup>133</sup> Accordingly, profits from the BCS arrangement give BCS universities a competitive advantage in building facilities, hiring coaches, and recruiting athletes.<sup>134</sup>

Because of the numerous adverse effects of the BCS on Division I-A college football, a successful lawsuit appears to be an ideal solution for non-BCS schools. After all, an antitrust lawsuit seeking both treble damages and a permanent injunction seems relatively simple when compared to the endless road of negotiations and concessions required to dismantle the BCS, which, in the end, may leave non-BCS schools no better off than when the battle began. A closer examination of the Sherman Act, however, reveals that those who believe a lawsuit will be effective in defeating the BCS have confused athletic competition with economic competition. In the end, a lawsuit will prove fruitless and will not provide non-BCS universities with the "spoils" they desire.

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131. *Cowen House Statement*, *supra* note 4, at 20, 45. In analyzing the impact of athletic deficits, another consideration is the costs that some universities face to play in certain athletic conferences. For example, the costs to play in the Western Athletic Conference include high travel expenses and nonlucrative television packages because the Western Athletic Conference membership is geographically diverse and is not a part of the BCS. See John Klein, *Tulane Decision Sends a Message to the 'Have-Nots'*, *TULSA WORLD*, June 15, 2003, at B1.

132. *Cowen House Testimony*, *supra* note 10, at 16-17.

133. John Henderson, *Taking on BCS Powers: Sept. 4 Hearing About Fairness*, *DENVER POST*, Aug. 20, 2003, at D1.

134. *Young House Testimony*, *supra* note 11, at 28. This revenue disparity has even raised congressional concern. Liz Clarke, *Congress Will Get Involved in BCS Debate This Week*, *WASH. POST* (Sept. 1, 2003), available at <http://www.washingtonpost.com/wp-dyn/articles/A8402-2003Aug31.html>. See generally *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 2 (2003); *Competition and Antitrust Issues in College Athletic Conferences: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 2 (2003).

Specifically, non-BCS institutions claim that the BCS has a detrimental effect on their entire athletic program, which then causes non-BCS schools to have trouble complying with Title IX. *Young House Testimony*, *supra* note 11, at 28. Although the Title IX implications of the BCS are beyond the scope of this comment, Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in educational programs and activities. 20 U.S.C. § 1681 (2000). Under Title IX, an institution that receives federal funds and sponsors athletic programs must provide equivalent athletic opportunities for men and women. *Id.*

### III. Federal Antitrust Law — The Sherman Act of 1890

The purpose of the Sherman Act<sup>135</sup> is to prevent or suppress practices that create monopolies or restrain trade.<sup>136</sup> The drafters designed the Act as a “comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade.”<sup>137</sup> The Sherman Act aims to break up conduct that unfairly tends to destroy competition.<sup>138</sup> Although some dispute exists about whether the Act’s purpose of imposing federal control was for the consumer or for smaller competitors,<sup>139</sup> courts tend to label the Act as a “consumer welfare prescription.”<sup>140</sup>

#### A. How College Football and the BCS Fit the Sherman Act’s Scope

The Sherman Act is aimed primarily at combinations having commercial objectives.<sup>141</sup> College football easily fits within the scope of the Sherman Act

135. 15 U.S.C. §§ 1-7 (2000). Although various antitrust laws exist, “[c]ases involving cartels, monopolization, and attempts to monopolize are still decided under the Sherman Act.” HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 2.1 (2d ed. 1999).

136. *United States v. U.S. Steel Corp.*, 251 U.S. 417, 463 (1920) (Day, J., dissenting).

137. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); see 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 7 (1996).

138. 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 1. The Sherman Act provides for both criminal prosecutions and civil litigation as enforcement mechanisms; however, private parties may only enforce the Sherman Act through civil litigation. Meyers & Horowitz, *supra* note 124, at 671.

The Clayton Act, 15 U.S.C. §§ 12-27, companion legislation to the Sherman Act, provides that: “[A]ny person who shall be injured . . . by reason of anything forbidden in the antitrust laws may sue” for relief. *Id.* § 15(a). Pursuant to the Clayton Act, private parties may recover treble damages, injunctive relief, and one-way attorneys’ fees for antitrust violations. See *id.* §§ 15(a), 26; Meyers & Horowitz, *supra* note 124, at 672 (“Attorney’s fees are awardable only to a successful plaintiff, not to the prevailing party.”).

Notably, private plaintiffs could not seek injunctive relief until in 1964, pursuant to 15 U.S.C. § 26, Congress provided that “[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . .” *Id.* “According to some legal scholars, private plaintiffs are using antitrust injunctions” at an ever-increasing rate. Meyers & Horowitz, *supra* note 124, at 674. The remedial nature of an antitrust injunction provides for dissolving the combination and eliminating possible future violations. John J. Flynn, *A Survey of Injunctive Relief Under State and Federal Antitrust Laws*, 1967 UTAH L. REV. 344, 349 (determining that antitrust injunctive relief “eliminate[s] the vestiges of transgressions of the past and . . . prohibit[s] future violations”).

139. Meyers & Horowitz, *supra* note 124, at 671.

140. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

141. *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959).



because modern collegiate football has many aspects that commercialize the nonprofit, amateur motives of the game.<sup>142</sup> The commercial objectives of college football include television contracts, corporate sponsorships, and bowl game revenues.<sup>143</sup> Notably, bowl game revenue alone can yield some universities more than \$1.2 million each year.<sup>144</sup>

In addition to college football falling within the scope of the Sherman Act, the BCS cannot gain antitrust exemption status for two reasons: (1) the economic interests of the BCS, and (2) its operation as a joint venture to provide college football consumers with a national championship game.<sup>145</sup> Not surprisingly, the BCS and its bowl games<sup>146</sup> significantly add to the commercial nature of college football. In its five-year existence, the BCS has distributed about half a billion dollars to its member institutions.<sup>147</sup>

Moreover, the BCS conferences operate as a joint venture to produce an entertainment product; namely, a national championship game, through the

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142. Kristin R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 MARQ. SPORTS L. REV. 257, 262 (2003) (noting that the commercial aspects of college athletics prevent it from avoiding antitrust analysis).

143. *See Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977) (acknowledging the business aspect of amateur athletics and noting that "intercollegiate athletics in its management is clearly business, and big business at that").

144. *Perlman Senate Statement*, *supra* note 58, at 70 (noting the \$1.2 million dollar payout to each of the Big 12 institutions); *see supra* Part II-F.

145. *See Hennessey*, 564 F.2d at 1149 (finding that the NCAA's interest in providing athletic events to the public brought the NCAA under the scope of the Sherman Act); Wallace, *supra* note 33, at 70.

146. The individual bowl games, though officially nonprofit, also fall under the Sherman Act. *Tribble Senate Statement*, *supra* note 22, at 17 (noting that the Orange Bowl Committee is a nonprofit organization that produces the annual FedEx Orange Bowl game). The nonprofit classification of the bowl games does not matter in an antitrust analysis. For example, in *Board of Regents*, the Supreme Court subjected the NCAA to antitrust liability despite its nonprofit status. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100-01 n.22 (1984) (*Bd. of Regents III*); *see also* *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 576 (1982) (illustrating that the Court will impose antitrust liability on nonprofit groups engaged in anticompetitive conduct).

Moreover, the commercial objectives of the bowl games are evidenced by the revenues generated. In the 2003 bowl season, for example, twenty-eight bowl games, not all of them BCS bowls, brought economic benefits of more than \$1 billion to each of the host communities. *Tribble Senate Statement*, *supra* note 22, at 18. In effect, the BCS bowls are big business ventures seeking to "enrich themselves and the cities in which they live." *Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S. Comm. on the Judiciary*, 105th Cong. 111 (1997) (statement of Tim Layden, Senior Writer, *Sports Illustrated*).

147. *Cowen House Testimony*, *supra* note 10, at 16.

production of four<sup>148</sup> postseason bowl games.<sup>149</sup> In the BCS, six conferences have agreed to guarantee their respective conference champions automatic berths in the BCS bowl games.<sup>150</sup> Thus, the joint venture is producing a national championship game as its product. Without the agreement among the conferences, a national championship game would probably not occur because of the historically and contractually established conference relationships with various bowls.<sup>151</sup> The BCS fits the joint venture definition because no single team or conference could produce the product without the agreement and the joint action of other universities and conferences.

Furthermore, the Court has expressly applied the Sherman Act's "sweeping language" to nonprofit organizations, including institutions of higher learning.<sup>152</sup> If there were any doubt about whether the Sherman Act applied to college football, *Board of Regents* resolved this question with an emphatic "yes." In a 7-2 decision, the Supreme Court held that the NCAA's arrangement for telecasting college football games violated § 1 of the Sherman

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148. See *supra* note 2 (noting that the BCS will add a fifth bowl game after the 2006 regular season).

149. The BCS constitutes an economic joint venture among the universities and conferences involved. See BLACK'S LAW DICTIONARY 843 (7th ed. 1999) (defining a joint venture as "[a] business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project."); BOWL CHAMPIONSHIP SERIES: FREQUENTLY ASKED QUESTIONS, at <http://www.bcsfootball.org/index.cfm?page=faq> (last visited Aug. 30, 2004) (noting that there are four contracts in play — "(1) a contract between the Big Ten, Pac-10, [and] the Rose Bowl; (2) a Rose Bowl-ABC contract; (3) the BCS agreement with . . . conferences, Notre Dame, and three bowl games, and (4) a contract between the BCS and ABC"). See generally FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

The Supreme Court held in *Pan American World Airways v. United States*, 371 U.S. 296 (1963), that joint ventures are not excluded from the reach of the antitrust laws. *Id.* at 307; see also HOVENKAMP, *supra* note 135, § 5.2 (noting that when joint ventures are condemned as illegal combinations, it is because they eliminate competition between the parties or exclude nonmember firms from access to a certain market).

For purposes of the antitrust laws, the joint venture of "four computer firms to develop a new memory device and of a collegiate football conference to structure its playing schedule and rules are treated in a surprisingly similar fashion." *Id.*

150. See *supra* note 101 and accompanying text.

151. *Delany House Statement*, *supra* note 1, at 14.

152. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 n.22 (1984) (*Bd. of Regents III*) ("There is no doubt that the sweeping language of § 1 applies to nonprofit entities.").

Act.<sup>153</sup> With its decision, the Court opened the floodgates to the pursuit of antitrust claims in amateur athletics,<sup>154</sup> and consequently, § 1 of the Act would allow an antitrust claim to be brought against the BCS.

*B. The Sherman Act's Requirements of Interstate Commerce and Standing*

Section 1 of the Sherman Act prohibits "restraint[s] of trade or commerce among the several states."<sup>155</sup> Thus, in addition to satisfying the scope of the Sherman Act, the complaining party must also show that the trade restraint affected interstate commerce under § 1 of the Act. The BCS clearly implicates interstate commerce by inviting out-of-state teams to travel to states where the bowl games are held.<sup>156</sup> Likewise, the college football regular season implicates interstate commerce every game day when players travel to distant locations to compete, and fans travel across state lines to support their teams. Ultimately, the BCS and its member universities fall under the Act because of the organization's commercial objectives<sup>157</sup> and the BCS's interstate commerce.<sup>158</sup>

Although the Clayton Act<sup>159</sup> requires plaintiffs to also have standing to pursue a Sherman Act claim,<sup>160</sup> courts rarely reach a conclusion on standing without first finding an antitrust violation.<sup>161</sup> When a court concludes that an antitrust claim lacks merit, the court usually dismisses the claim without considering the issue of standing.<sup>162</sup> As illustrated below,<sup>163</sup> there is no

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153. *Id.* at 120.

154. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 CAP. U. L. REV. 125, 136 (2002) (noting that no other sport, except baseball, is "blessed with an exemption from antitrust scrutiny"). See generally *Bd. of Regents III*, 468 U.S. 85 (1984).

155. 15 U.S.C. § 1 (2000).

156. See *Hennessey v. NCAA*, 564 F.2d 1136, 1150-51 (5th Cir. 1977).

157. REVENUE DISTRIBUTION, *supra* note 117 (reporting that estimated 2005 BCS revenue distribution is over \$93 million).

158. See generally *Bd. of Regents III*, 468 U.S. 85 (1984).

159. 15 U.S.C. §§ 12-27.

160. *Id.* § 26.

161. See *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1318 (9th Cir. 1996).

162. See *id.* For example, in *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988), the appellate court did not address the standing issue and dismissed the complaint on the merits of the antitrust claim. *Id.* at 1343 (deciding "not to resolve the issue whether the football players are proper plaintiffs" but instead choosing to "address the antitrust claims on their merits"); see also *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1545 (11th Cir. 1996) (not reaching standing issue because the appellant had failed to show an antitrust violation); *Sicor Ltd. v. Cetus Corp.*, 51 F.3d 848, 855 n.10 (9th Cir. 1995) (deciding not to address standing because the appellant's antitrust claim had no merit).

163. See *infra* Part V.A.

standing issue with regard to non-BCS schools' complaints against the BCS because no substantive antitrust claim exists. Accordingly, a court would likely dismiss the antitrust action on the merits without addressing whether the non-BCS conference or university had standing to sue.<sup>164</sup>

*C. Choosing the Operative Section of the Sherman Act for an Antitrust Challenge to the BCS*

Several sections make up the Sherman Act, two of which are relevant to this comment. Section 1 provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal."<sup>165</sup> The U.S. Supreme Court in *Standard Oil Co. v. United States*<sup>166</sup> determined that the language of § 1 was not intended to bar all contracts that restrain trade, but was instead designed only to bar those contracts that illustrated "unreasonable restraints of trade."<sup>167</sup> Consequently, non-BCS schools must prove that the BCS participated in an agreement that *unreasonably* restrained trade to show a § 1 violation.<sup>168</sup>

Section 2 of the Sherman Act forbids monopolization and attempts or conspiracies to monopolize the market.<sup>169</sup> In *United States v. E.I. du Pont de Nemours & Co.*,<sup>170</sup> the Supreme Court defined monopoly power as the power to control prices or exclude competition.<sup>171</sup> Market power sufficient to qualify as monopoly power has been defined as the ability of a firm to increase profits

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164. Although this comment argues that an antitrust claim against the BCS has no merit, non-BCS conferences or individual universities would likely have standing. See 15 U.S.C. § 26; *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 85 (1984) (*Bd. of Regents III*) (the University of Oklahoma and the University of Georgia, both unincorporated associations, brought suit against the NCAA, also an unincorporated association). Moreover, to fully address the standing issue, the Clayton Act requires that the antitrust plaintiff show injury to its business or property. *McCormack*, 845 F.2d at 1341. Non-BCS schools could allege that the financial disparity that exists between the payouts received by BCS conferences and non-BCS conferences during postseason play amounts to injury to their "business." See *Cowen House Testimony*, *supra* note 10, at 16-17.

165. 15 U.S.C. § 1.

166. 221 U.S. 1 (1911) (Harlan, J., concurring and dissenting).

167. *Id.* at 87.

168. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

169. HOVENKAMP, *supra* note 135, § 3.1.

170. 351 U.S. 377 (1956).

171. *Id.* at 391.

by reducing output.<sup>172</sup> Thus, to show a § 2 violation, non-BCS universities must prove that the BCS possesses an extremely large market share.<sup>173</sup>

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172. HOVENKAMP, *supra* note 135, § 3.1.

173. Bd. of Regents of Univ. of Okla. v. NCAA, 707 F.2d 1147, 1159 (10th Cir. 1983) (*Bd. of Regents II*); see 2 EARL W. KINTNER, FEDERAL ANTITRUST LAW § 12.6, at 352, 356-57 (1980) (collecting cases and noting that market share must approach 80% of the relevant market to constitute monopolization of a market).

To determine market share, a court must first determine “whether some ‘relevant market’ exists in which the legally necessary market power requirement can be inferred.” HOVENKAMP, *supra* note 135, §§ 3.1d, 3.2, 3.6 (defining the relevant product market as the smallest grouping of sales for which the elasticity of demand and supply are sufficiently low that a firm with one hundred percent of that grouping could profitably reduce output and increase price substantially above marginal costs; noting that a relevant market includes both a relevant product market and a relevant geographic market; and defining relevant geographic market as an area in which a firm can increase price without customers substituting the product or competitor suppliers bringing substitutes to the area); see Bd. of Regents of Univ. of Okla. v. NCAA, 546 F. Supp. 1276, 1297 (W.D. Okla. 1982) (*Bd. of Regents I*) (recognizing that “[d]efining a relevant market involves inquiries into a number of factors, including such characteristics of the industry as the geographic area in which it is available, the time at which it is available, special characteristics of the buyers and the sellers of the product, and special characteristics of the product itself”).

Although the definition of the relevant market proves difficult in making a case against the BCS, a court should look to *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1959), for guidance. See *Bd. of Regents I*, 546 F. Supp. at 1296 (noting that the most difficult factual inquiry in determining monopoly power is the definition of the relevant market). In *International Boxing*, the Supreme Court held that championship events may constitute a separate market from that of nonchampionship events in athletic competition. *Int'l Boxing Club*, 358 U.S. at 249-51 (holding that the championship boxing contest is a different market than all professional boxing events). Under the *International Boxing* rationale, a court might determine that postseason bowl games comprise a distinct market from that of regular season games. Assuming that postseason games comprise the relevant product market, the BCS's market share represents roughly 14.3% of postseason games, or four bowls out of twenty-eight total bowl games. See *Perlman Senate Statement*, *supra* note 58, at 70, 82. Moreover, the relevant market determination in *Board of Regents I* lends support to the assumption that the relevant market would be postseason bowl games in making a case against the BCS, rather than regular season games or sporting national championships generally. In *Board of Regents I*, the district court rejected the NCAA's argument that the relevant market was all television programming and instead held that “live college football television” was the relevant market. *Bd. of Regents I*, 546 F. Supp. at 1300, 1322. In monopolization cases, a court will search for a degree of market power possessed by a firm with an extremely large market share, usually approaching 80% of the relevant market. See KINTNER, *supra*. Thus, the BCS's meager 14.3% market share might lead to the conclusion that the BCS does not adequately monopolize the postseason bowl game market. See *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394 (1956) (noting that “[w]hen a product is controlled by one interest, without substitutes available . . . there is monopoly power”). Clearly, this is not the case because the BCS does not control all bowl games.

Section 1, however, will generally cover concerted action that may also constitute monopolization; thus, it would be unnecessary for non-BCS schools to seek relief under § 2.<sup>174</sup> Further, unlike § 2, no elaborate industry analysis is necessary under § 1 to show the anticompetitive character of the agreement when there is an agreement not to compete in terms of price or output.<sup>175</sup> Accordingly, a naked restraint on price and output requires defendants to produce procompetitive justifications under § 1, even in the absence of a detailed market analysis.<sup>176</sup> *NCAA v. Board of Regents of the University of Oklahoma* not only illustrates how a court balances the anticompetitive and procompetitive characteristics of challenged arrangements, but also shows why a court would analyze a potential § 1 violation by the BCS under a rule of reason analysis.

*IV. NCAA v. Board of Regents of the University of Oklahoma: The U.S. Supreme Court Decision That Laid the Groundwork for Future Antitrust Claims in College Football*

Courts analyze federal antitrust claims based on one of three levels of review: per se, quick look, or rule of reason.<sup>177</sup> In *Board of Regents*, the Supreme Court used a rule of reason approach after noting that certain industries, like athletics, require horizontal restraints if competition is to exist at all.<sup>178</sup> Thus, the per se<sup>179</sup> and quick look<sup>180</sup> approaches are deemed

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174. Darling, *supra* note 69, at 445; 54 AM. JUR. 2D *Monopolies and Restraints of Trade* § 4 (1996) ("Section 2 was intended to supplement § 1 and to make sure that by no possible guise could the public policy embodied in § 1 be frustrated or evaded.").

175. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 (1984) (*Bd. of Regents III*).

176. *Id.* at 110.

177. Darling, *supra* note 69, at 450.

178. *Bd. of Regents III*, 468 U.S. at 100-01.

179. Courts reserve the per se approach for restraints of trade that are so unreasonable that they are deemed illegal on their face, without an elaborate inquiry into their purported justifications. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (holding that the per se analysis is used for restraints that "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*"); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 8 (1979) (holding that "certain agreements or practices are so 'plainly anticompetitive' and so often 'lack . . . any redeeming virtue' that they are conclusively presumed illegal without further examination") (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978) and *N. Pac. Ry. Co v. United States*, 356 U.S. 1, 5 (1958)); Mark R. Leduc, *Law v. National Collegiate Athletic Association: A Guide to How Courts Will Treat Future Antitrust Challenges to NCAA Regulations*, 26 J.C. & U.L. 139, 146 (1999) (noting that the court applies the per se doctrine to find certain types of business practices illegal without a formal adjudication of their reasonableness). A court

inapplicable<sup>181</sup> in the context of college football because of the Court's

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typically reverts to the per se approach for cases involving price fixing, concerted refusal to deal, tying arrangements, group boycotts, and division of markets. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959) (finding an agreement not to sell to an individual retailer constituted a group boycott subject to the per se rule); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 597-98 (1951) (holding division of markets among conspirators is a per se violation); *Associated Press v. United States*, 326 U.S. 1, 12-15 (1945) (finding that joint newspaper venture cannot expressly prohibit transactions with nonmembers); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 467-68 (1941) (holding a group boycott is per se illegal); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (finding that major oil refiners' concerted program to purchase distressed gasoline to prop up market price constitutes price fixing subject to per se analysis). But see *Smith v. Pro Football Inc.*, 593 F.2d 1173, 1180 (D.C. Cir. 1978) (determining that a court will avoid using the per se rule in group boycott situations where "the need for cooperation among participants necessitated some type of concerted refusal to deal"); *Worthen Bank & Trust Co. v. Nat'l BankAmericard, Inc.*, 485 F.2d 119, 126-27 n.7 (8th Cir. 1973) (refusing to invoke the per se rule where the product represented by the bank credit card required cooperative relationships among member banks, and the product would be impossible for any bank to issue on its own).

180. The quick look approach is a truncated version of the rule of reason analysis. See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 757 (1999) (holding that the quick look standard is reserved for cases in which "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets"); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993) (noting that the quick look approach applies in cases "where per se condemnation is inappropriate," but where no elaborate analysis is needed to show the anticompetitive effects of the questionable restraint); *Leduc*, *supra* note 179, at 148-49 (noting that courts employ this intermediate level of scrutiny where "the adverse impact of a restraint . . . is obvious on its face, but the per se prohibition is deemed inappropriate"). In a quick look analysis, the court relieves the plaintiff of the initial burden of proving anticompetitive effects when the harmful effect of the challenged conduct is evident, and the initial burden is placed on the defendant to proffer procompetitive justifications for the restraint. *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992) (noting that if the defendant fails to set forth legitimate justifications for the restraint, "the court condemns the practice without ado"). If the defendant succeeds in offering valid procompetitive justifications, then the court resorts to the traditional rule of reason analysis to weigh the reasonableness of the restraint. *Brown Univ.*, 5 F.3d at 669.

181. To find that the BCS constitutes a per se violation of the Sherman Act, a court would have to determine that the BCS has a severe anticompetitive impact and lacks a countervailing benefit. *Law v. NCAA*, 134 F.3d 1010, 1018 (10th Cir. 1998); see PHILLIP E. AREEDA, *ANTITRUST LAW* ¶ 1478, at 359 (1986) (noting that courts "have not woodenly applied the per se prohibitions developed for ordinary business situations" to sports leagues); *Leduc*, *supra* note 179, at 146.

To use the quick look approach, a court would need to conclude that the arrangement in question had an obvious anticompetitive effect on customers and markets. *Cal. Dental Ass'n*, 526 U.S. at 757. The BCS arrangement is not obviously anticompetitive. After all, there are twenty-four other bowl games in which universities may participate, and there are mechanisms in place that allow non-BCS schools to participate in BCS bowl games. Rather, a rudimentary

determination that a rule of reason analysis is required in certain industries like athletics.<sup>182</sup>

*A. Board of Regents: Facts and Prior History*

*Board of Regents* presented the U.S. Supreme Court with an opportunity to decide the extent to which federal antitrust laws apply to intercollegiate athletics and the standard of review that should be used for antitrust claims in college athletics.<sup>183</sup> The lawsuit stemmed from the NCAA television plan that limited the total number of televised intercollegiate football games and the number of games that any one college could televise.<sup>184</sup> The plan did not allow NCAA-member institutions, including plaintiffs the University of Oklahoma (Oklahoma) and the University of Georgia (Georgia), to sell any television rights except in accordance with the NCAA plan.<sup>185</sup>

The main controversy arose when a number of NCAA-member football conferences and independent schools, including Oklahoma and Georgia, joined together to form the College Football Association (CFA).<sup>186</sup> After the CFA negotiated an independent television contract with the National

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understanding of the market shows that the BCS contract has procompetitive effects, such as increasing overall bowl revenues and opportunities for all college football teams. *See* Toscano v. PGA Tour, Inc., 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002) (“In producing an entertainment product, the [PGA] Tour incorporates an element of competition as part of the product but the [participants] are not in economic competition with one another any more than the celebrity participants in a game show or the runners in a track meet. The presence of obvious procompetitive justifications for the eligibility rules, in the sense that they help to create the product, and the corresponding absence of clear anticompetitive effect, require application of full rule of reason analysis.”).

182. *See Bd. of Regents III*, 468 U.S. at 100-01.

183. Before *Board of Regents*, courts had applied federal antitrust laws to professional sports, including basketball, golf, and hockey. *See* Michael Jay Kaplan, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. FED. 489 (1974).

184. *Bd. of Regents III*, 468 U.S. at 94 (noting that the plan’s requirements mandated that the carrying television networks schedule television appearances for at least eighty-two different universities and that no member university was eligible to appear on television more than a total of six times — no more than four times nationally during any two-year period — with these appearances divided equally among the two networks, ABC and CBS). Football was the only sport in which the NCAA regulated the televising of athletic events. Schools were free to make whatever television arrangements they desired in other sports. *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1284 (W.D. Okla. 1982) (*Bd. of Regents I*).

185. *Bd. of Regents III*, 468 U.S. at 94. The plan allowed NCAA members a limited opportunity to televise their games if the member obtained special permission from the NCAA to telecast a specific game within a limited geographic area on a local station. *Bd. of Regents I*, 546 F. Supp. at 1284.

186. *Bd. of Regents I*, 546 F. Supp. at 1285.



Broadcasting Company (NBC), the NCAA threatened disciplinary procedures and sanctions against participating CFA members for violating the NCAA rules.<sup>187</sup> The NCAA made clear that the sanctions would affect not only the football programs of the CFA members, but also other intercollegiate sports.<sup>188</sup>

Oklahoma and Georgia filed suit in the Western District of Oklahoma, challenging the NCAA's right to require its television plan to be exclusive and seeking injunctive relief.<sup>189</sup> The plaintiffs claimed that the NCAA restrained their right to enter into their own television contracts, amounting to a "classic cartel" in violation of § 1 and § 2 of the Sherman Act.<sup>190</sup> The district court held that "NCAA controls over college football make [the] NCAA a classic cartel" and that this finding entitled the plaintiffs to injunctive and declaratory relief.<sup>191</sup> Relying on both a per se and rule of reason analysis, the court determined that under § 1, the NCAA television plan constituted price fixing and a group boycott, and that under § 2, the NCAA monopolized the intercollegiate football broadcasting market.<sup>192</sup> Central to the district court's reasoning was that the NCAA imposed what amounted to production limits on its members and maintained mechanisms for punishing members who sought to stray from the production quotas.<sup>193</sup> Moreover, the distribution of television revenues under the NCAA plan did not resemble the distribution expected in a free market.<sup>194</sup>

The U.S. Court of Appeals for the Tenth Circuit affirmed the finding that the NCAA television plan constituted price fixing and was per se illegal under § 1.<sup>195</sup> The appellate court rejected the NCAA's argument that the purpose of the television plan was to promote athletically balanced competition, reducing the consideration to an argument that "competition will destroy the market."<sup>196</sup> Because the court affirmed the § 1 price-fixing claim, it did not consider the monopolization claim under § 2, noting that a reversal of the district court's § 2 ruling would not affect the injunction.<sup>197</sup> The appellate court, however, reversed the district court's finding that the NCAA plan amounted to a group

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187. *Id.* at 1285-86.

188. *Id.* at 1286.

189. *Id.*

190. *Id.* at 1281.

191. *Id.* at 1300.

192. *Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1149-50 (10th Cir. 1983) (*Bd. of Regents II*).

193. *Bd. of Regents I*, 546 F. Supp. at 1301.

194. *Bd. of Regents II*, 707 F.2d at 1154.

195. *Id.* at 1162.

196. *Id.* at 1154.

197. *Id.* at 1159 n.16; Meyers & Horowitz, *supra* note 124, at 683.

boycott, holding that the colleges were not in competition with the broadcasters, which was a necessary element to the existence of an illegal boycott.<sup>198</sup>

With relatively few federal court decisions applying federal antitrust laws to amateur athletics,<sup>199</sup> the U.S. Supreme Court granted the NCAA's petition for writ of certiorari to determine (1) whether the per se approach was the proper standard of review for college athletics under federal antitrust law, and (2) whether the NCAA television plan violated the Sherman Act.<sup>200</sup>

## *B. Majority Holding and Reasoning*

### *1. The Supreme Court Rejects a Per Se Approach*

In an opinion authored by Justice Stevens, the Supreme Court held that the NCAA television plan limited output and restrained the ability of any institution to make a sale of television rights outside of the plan.<sup>201</sup> The Court, however, favored a rule of reason approach over a per se approach in its antitrust analysis because of the nature of college football.<sup>202</sup> The Court decided that

it would be inappropriate to apply a per se rule to this case. This decision is *not* based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.<sup>203</sup>

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198. *Bd. of Regents II*, 707 F.2d at 1160; Meyers & Horowitz, *supra* note 124, at 683. The NCAA also contended that the injunction granted by the district court was too vague and overly broad. *Bd. of Regents II*, 707 F. 2d. at 1161-62. The Tenth Circuit remanded the issue on the breadth of the injunction to allow the district court to consider its injunction in light of the appellate opinion. *Id.* at 1162. After the district court's review, the injunction remained virtually the same. Meyers & Horowitz, *supra* note 124, at 683.

199. *Bd. of Regents II*, 707 F.2d at 1164 (Barrett, J., dissenting).

200. *NCAA v. Bd. of Regents of Univ. of Okla.*, 464 U.S. 913 (1983).

201. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109-10 (1984) (*Bd. of Regents III*).

202. *Id.* at 100.

203. *Id.* at 100-01 (emphasis added).

The Court determined that college football was unique in the sense that the NCAA and its member institutions were marketing competition itself.<sup>204</sup> In other words, the Court reasoned that there would be no product if “there was not cooperation between competing teams, their conferences, and other necessary entities.”<sup>205</sup> Departing from a per se approach, which was generally afforded to horizontal price-fixing arrangements, the Court instead adopted a rule of reason approach. Despite this departure, the Court nevertheless affirmed the district court and appellate court decisions using the rule of reason standard.<sup>206</sup>

## 2. Rule of Reason Analysis: A Closer Look

The rule of reason analysis, now the most common standard employed by courts in antitrust claims involving amateur athletics,<sup>207</sup> balances several factors by using a burden-shifting test.<sup>208</sup> Courts use this test when the effects on full and free competition are not readily apparent.<sup>209</sup> Under a rule of reason analysis, the court must analyze the “facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.”<sup>210</sup>

A rule of reason analysis involves a step-by-step approach. First, to establish a prima facie case, the plaintiff must prove the anticompetitive effects of the restraint of trade.<sup>211</sup> This burden requires the plaintiff to show

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204. *Id.* at 101.

205. *Meyers & Horowitz, supra* note 124, at 685.

206. *Id.*

207. *Muenzen, supra* note 142, at 265 (noting that the Supreme Court uses the rule of reason in cases involving restraints of trade in college athletics); *see Bd. of Regents III*, 468 U.S. at 103 (holding that the price and output restrictions at issue were subject to a rule of reason analysis); *Hairston v. Pac. 10 Conference*, 101 F.3d 1315, 1318-19 (9th Cir. 1996) (using a rule of reason analysis to find that imposing sanctions for violations of NCAA rules did not violate § 1 of the Sherman Act); *Banks v. NCAA*, 977 F.2d 1081, 1088-94 (7th Cir. 1992) (holding that the no-draft and no-agent rules for student athletes do not offend the Sherman Act under a rule of reason analysis); *Justice v. NCAA*, 577 F. Supp. 356, 379-82 (D. Ariz. 1983) (determining that NCAA sanctions for violations of a rule barring student-athlete compensation did not violate antitrust laws under rule of reason standard).

208. *See Darling, supra* note 69, at 458.

209. *Id.*

210. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978); *see also Bd. of Trade of City of Chi. v. United States*, 246 U.S. 231, 238 (1918) (recognizing that the history of the restraint and the purpose sought to be attained by imposing the restraint are relevant facts). Contrast the rule of reason analysis with a per se approach where a court deems the restraint of trade illegal on its face without an elaborate inquiry into the restraint's justifications. *See supra* note 179.

211. *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (noting that the plaintiff

that the restraint has a “substantially adverse effect on competition.”<sup>212</sup> Anticompetitive effects are shown by a reduction of output,<sup>213</sup> increase in price, deterioration in the quality of goods or services,<sup>214</sup> or proof of the defendant’s “market power.”<sup>215</sup>

If the plaintiff satisfies their burden, the burden then shifts to the defendant to present evidence that the procompetitive benefits outweigh the anticompetitive effects of the restraint.<sup>216</sup> An arrangement that restrains trade survives judicial scrutiny only if the procompetitive effects excuse the anticompetitive result.<sup>217</sup> In amateur athletic cases, courts will recognize only those justifications “necessary to produce competitive intercollegiate sports” as legitimate rationales.<sup>218</sup> Courts have accepted increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice as justifications for otherwise anticompetitive effects.<sup>219</sup> Courts have refused, however, to recognize mere profitability or cost savings as a legitimate justification for anticompetitive behavior.<sup>220</sup>

Finally, if the defendant meets the burden of presenting procompetitive benefits, then the plaintiff must show that the procompetitive effects could be achieved in a less restrictive manner or that the restraint fails to promote the defendant’s stated objective.<sup>221</sup> Essentially, this final burden requires the plaintiff to show that the restraint was not “reasonably necessary to achieve the stated objective.”<sup>222</sup> The court then determines whether the procompetitive aspects of the conduct justify the anticompetitive effects.<sup>223</sup>

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satisfies this burden by “proving the existence of actual anticompetitive effects”).

212. *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998).

213. *See FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460-61 (1986).

214. *See Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 728 (3rd Cir. 1991).

215. *See NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984) (*Bd. of Regents III*). A requisite showing of the defendant’s market power represents an indirect way of establishing an anticompetitive effect. *See Law*, 134 F.3d at 1019 (finding a plaintiff may establish an anticompetitive effect indirectly by adducing evidence of the defendant’s market power or directly by showing actual anticompetitive effects, such as control over price or output).

216. *See Leduc*, *supra* note 179, at 148.

217. *Law*, 134 F.3d at 1021.

218. *Id.*

219. *Id.*

220. *Id.* at 1023.

221. *Darling*, *supra* note 69, at 459.

222. *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

223. *Law*, 134 F.3d at 1017.

### 3. Board of Regents: The Supreme Court's Application of the Rule of Reason Analysis in College Football

Using the rule of reason analysis, the Supreme Court in *Board of Regents* held that the NCAA's arrangement limited output and fixed prices, leaving the college football industry unresponsive to consumer preference.<sup>224</sup> Although the Court employed a rule of reason approach, the Court commented that the ultimate focus of the analysis was "to form a judgment about the competitive significance of the restraint."<sup>225</sup>

The Court found several anticompetitive consequences of the arrangement. The NCAA's television plan had the anticompetitive effect of causing individual competitors to lose their freedom to compete<sup>226</sup> because the plan: (1) placed a ceiling on the number of games member institutions could televise, and (2) artificially limited the quantity of televised college football available to broadcasters and consumers.<sup>227</sup>

The Court then looked to the NCAA to establish procompetitive benefits of the agreement to justify the plan's deviation from the operation of a free market.<sup>228</sup> The NCAA, however, failed to proffer any legitimate, procompetitive justifications for its television plan.<sup>229</sup> Relying on *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (BMI)*,<sup>230</sup> the NCAA argued that the television plan constituted a joint venture to protect the live attendance at intercollegiate football games and assist in the marketing of broadcast rights.<sup>231</sup> The Court, however, rejected the NCAA's argument on the basis that the NCAA television plan limited, not enhanced, production because no individual school remained free to televise its own games without restraint.<sup>232</sup> In contrast to the NCAA's plan, the *BMI* plan did not place limits

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224. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) (*Bd. of Regents III*).

225. *Id.* at 103 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

226. *Id.* at 106-07.

227. *Id.* at 99.

228. *Id.* at 113.

229. *See id.* at 115.

230. 441 U.S. 1 (1979).

231. *Bd. of Regents III*, 468 U.S. at 113-15. In *BMI*, television networks unsuccessfully brought an antitrust suit against the licensing agencies for musical composers, alleging that the system by which the licensing agencies received fees for the issuance of blanket licenses constituted illegal price fixing. *Id.* at 114.

232. *Id.* at 114-15.

on production and also freed individual artists to sell their own music without restraint.<sup>233</sup>

*C. Courts Follow the Supreme Court's Lead from Board of Regents: A Brief Look at the Cases in Intercollegiate Athletics Using a Rule of Reason Analysis*

Subsequent antitrust cases have used the rule of reason standard to analyze other combinations in college athletics under the Sherman Act. In *Regents of the University of California v. American Broadcasting Co.*,<sup>234</sup> the Court of Appeals for the Ninth Circuit reviewed a district court decision granting a preliminary injunction against the ABC and CFA television plan.<sup>235</sup> Relying on *Board of Regents*, the court determined that the plaintiffs had established a strong likelihood of success on the merits of their antitrust claim.<sup>236</sup> The court held that the arrangement between ABC and the CFA shared the same infirmities as the NCAA television plan, namely a reduction in output and a sharp restraint on competition between individual schools.<sup>237</sup> Ultimately, the Ninth Circuit decided that the trial court had not abused its discretion in issuing a preliminary injunction against the television plan.<sup>238</sup>

In *Law v. NCAA*,<sup>239</sup> the Tenth Circuit Court of Appeals held that an NCAA rule that limited a coach's annual compensation violated the Sherman Act under a rule of reason analysis.<sup>240</sup> The NCAA did not contest the district court's determination that the rule had the anticompetitive effect of unreasonably restraining trade,<sup>241</sup> and the appellate court rejected the NCAA's proffered procompetitive justifications of cost-reduction<sup>242</sup> and the maintenance of competitive equity among member institutions.<sup>243</sup> Ultimately, the Tenth Circuit affirmed the district court's grant of summary judgment on the issue of antitrust liability.<sup>244</sup>

Cases following *Board of Regents* also illustrate the difficulties inherent in bringing antitrust claims in intercollegiate athletics. For example, in *Banks v.*

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233. *Id.* at 114.

234. 747 F.2d 511 (9th Cir. 1984).

235. *Id.* at 515.

236. *Id.* at 519.

237. *Id.* at 518.

238. *Id.* at 519.

239. 134 F.3d 1010 (10th Cir. 1998).

240. *Id.* at 1012.

241. *Id.* at 1016.

242. *Id.* at 1022-23.

243. *Id.* at 1023-24.

244. *Id.* at 1012.

NCAA,<sup>245</sup> a college football player brought an action alleging that the NCAA's no-draft, no-agent rules violated the Sherman Act. The Seventh Circuit affirmed the district court's dismissal of the plaintiff's complaint, finding that although the plaintiff cited examples of antitrust law violations, such as group boycott, price fixing, and restriction of output, the plaintiff failed to allege the anticompetitive effects of the NCAA rules.<sup>246</sup> The court noted that the absence of anticompetitive allegations "is ordinarily fatal to the existence of a cause of action."<sup>247</sup>

*D. Is a Rule of Reason Analysis Applicable to the BCS?*

An antitrust claim against the BCS should fall under a rule of reason analysis because college football has been recognized as an industry in which horizontal restraints on athletic competition are necessary to allow the product, whether a regular season or national championship game, to be available at all.<sup>248</sup> A horizontal restraint of trade is "an agreement among competitors on the way in which they will compete with one another."<sup>249</sup> In essence, college football requires its producers, namely the individual universities and conferences, to agree to compete with one another under certain rules of competition to make regular season games and bowl games possible.<sup>250</sup>

Furthermore, the BCS produces a national championship game, which serves as an entertainment product for the consumer. The court's analysis in *Toscano v. PGA Tour, Inc.*,<sup>251</sup> concluding that a rule of reason analysis should apply in a case involving professional golf, also supports the conclusion that the BCS would be subject to a rule of reason analysis:

In producing an entertainment product, the [PGA] Tour incorporates an element of competition as part of the product but

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245. 977 F.2d 1081 (7th Cir. 1992).

246. *Id.* at 1087.

247. *Id.* (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107-08 (7th Cir. 1984)).

248. Gregory M. Krakau, Note, *Monopoly and Other Children's Games: NCAA's Antitrust Suit Woes Threaten Its Existence*, 61 OHIO ST. L.J. 399, 403 (2000) (referring to *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984) (*Bd. of Regents III*), where the Court held that rule of reason was appropriate because the case "involve[d] an industry in which horizontal restraints on competition are essential if the product is to be available at all"); see *Roberts Senate Statement*, *supra* note 125, at 89-90 (rule of reason).

249. *Bd. of Regents III*, 468 U.S. at 99.

250. *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1295 (W.D. Okla. 1982) (*Bd. of Regents I*).

251. 201 F. Supp. 2d 1106 (E.D. Cal. 2002).

the [participants] are not in economic competition with one another any more than the celebrity participants in a game show or the runners in a track meet. The presence of obvious procompetitive justifications for the . . . rules, in the sense that they help to create the product, and the corresponding absence of clear anticompetitive effect, require application of full rule of reason analysis.<sup>252</sup>

The NCAA does not run a playoff system to determine a national champion; thus, universities and conferences must work together to give fans a national championship game. The BCS arrangement requires its member conferences to agree to send their respective champions to BCS bowl games, otherwise, the agreement would fail.<sup>253</sup> Both the general nature of athletic competition in college football and the BCS agreement require horizontal restraints on competition to allow the bowl games, or athletic competition, to exist at all.

Following *Board of Regents* and its progeny, the next logical step in a rule of reason analysis of the BCS would be to balance the anticompetitive results against the procompetitive benefits of the BCS. The next section illustrates why this seemingly logical step would be incorrect given the policy reasons behind the federal antitrust laws.

## *V. Confusing Athletic and Economic Competition: The Legality of the BCS*

### *A. Missing the Crucial Second Step*

After determining that a rule of reason analysis applies to an antitrust claim against the BCS, several legal scholars who support the claim that the BCS system violates the Sherman Act suggest that the next step is to address the procompetitive and the anticompetitive aspects of the BCS.<sup>254</sup> Though the BCS exemplifies both anticompetitive<sup>255</sup> and procompetitive characteristics,<sup>256</sup> this

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252. *Id.* at 1121.

253. See *supra* notes 25-28, 69-85 and accompanying text.

254. See *Roberts Senate Statement*, *supra* note 125, at 89-90; see generally Darling, *supra* note 69; Hales, *supra* note 85; Wallace, *supra* note 33.

255. The alleged anticompetitive aspects of the BCS are presented in Parts II.E-F. These aspects include not only financial and branding benefits for those schools associated with the BCS, but also the stark reality that those outside of the BCS may never compete in a BCS bowl game under the current arrangement. See *supra* Parts II.E-F.

256. The BCS might argue that the arrangement's procompetitive benefit of pairing the top two teams in a national championship game justifies any competitive restraint that a non-BCS school or conference might allege. See *Delany House Statement*, *supra* note 1, at 15 (defining



comment contends that those scholars are overlooking an essential step before weighing the anticompetitive and procompetitive features of the BCS — whether the challenged restraint impedes economic competition.<sup>257</sup>

Successful antitrust challenges in intercollegiate athletics, such as *Board of Regents, Regents of the University of California*, and *Law*, share something in common — the contested combinations in each case had the intentional effect of limiting output along with “sharp restraints on individual school competition.”<sup>258</sup> In contrast, the BCS arrangement fails to limit output because it does not restrict the number of bowl games played in the postseason. In fact, the number of bowl games has increased, rather than decreased, since the advent of the BCS.<sup>259</sup> Thus, it appears that economic competition has actually been enhanced, not diminished, by the BCS.<sup>260</sup>

The possibility for a successful antitrust lawsuit would exist if the BCS bowl games were the only bowl games, or if the BCS completely foreclosed the non-BCS schools from an opportunity to participate in the BCS bowl games.<sup>261</sup> Such an arrangement would clearly limit output and cause sharp restraints in the ability of a university to compete. However, this is not the case under the current BCS system. Rather, the BCS bowl games are simply four<sup>262</sup> bowl games that provide two at-large positions for *any* Division I-A school.<sup>263</sup> In addition, the BCS does not control or diminish the ability of the other twenty-four bowl games to compete. Ultimately, the NCAA, not the BCS, has the power to restrict the number of bowl games played because of the NCAA certification process.<sup>264</sup>

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the BCS as a “new product that is highly valued by the consumers of college football”).

257. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984) (*Bd. of Regents III*) (noting that the ultimate inquiry under the antitrust laws is whether the challenged restraint enhances economic competition).

258. *See, e.g., Regents of Univ. of Cal. v. Am. Broad. Co., Inc.*, 747 F.2d 511, 518 (9th Cir. 1984).

259. *See* 2003-2004 COLLEGE BOWL RESULTS, *supra* note 21.

260. Division I-A teams play twenty-four bowl games in addition to the four BCS bowl games, providing an opportunity for fifty-six teams to participate in postseason play. *See Tribble Senate Statement, supra* note 22, at 92-93.

261. *See Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1311 (W.D. Okla. 1982) (*Bd. of Regents I*) (noting that if a “power elite” in college football emerged and abused its competitive edge through illegal means, there would be some form of relief under the Sherman Act).

262. *See supra* note 2 (noting that the BCS will add a fifth bowl game after the 2006 regular season).

263. *See supra* notes 103-06 and accompanying text.

264. *See generally* NCAA — NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, at <http://www.ncaa.org> (last visited Aug. 30, 2004).

Unlike the universities in *Board of Regents*, individual competitors inside and outside of the BCS, including bowl games and all Division I-A universities, have not lost their freedom to compete.<sup>265</sup> Competition in Division I-A, even with the BCS arrangement, remains strong for several reasons. First, the BCS allows other bowl games to enter the market and in no way eliminates the ability of another entity from sponsoring a new bowl game.<sup>266</sup> Second, the BCS does not prevent the non-BCS schools or other bowl games from forming another bowl alliance and naming a “national champion.” Moreover, the BCS does not hold the exclusive rights to crown a national champion. This is clearly evidenced by the 2003 season, where the Associated Press Poll named the University of Southern California national champion, and the Coaches Poll named the winner of the BCS title game, Louisiana State University, national champion.<sup>267</sup>

In essence, the BCS is buying football services from six historically winning football conferences, marketing those teams and four<sup>268</sup> BCS bowl games to football fans, and calling the product a national championship game. Although the BCS excludes certain Division I-A schools, not every agreement that restrains competition violates the Sherman Act. Rather, to be unlawful, the agreement must unreasonably restrain competition, and the BCS clearly does not unreasonably restrain trade. While the BCS arrangement is not inclusive of all Division I-A schools and conferences, its capitalization on the bowl game market does not violate the antitrust laws because the Sherman Act does not mandate forced access absent application of the essential facilities doctrine.<sup>269</sup>

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265. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 106-07 (1984) (*Bd. of Regents III*) (noting that under the NCAA television plan, “[i]ndividual competitors [lost] their freedom to compete”).

266. For example, the PlainsCapital Fort Worth Bowl Game started in 2003, featuring top-ranked non-BCS schools, TCU and Boise State. PLAINSCAPITAL FORT WORTH BOWL, at <http://www.fwbowl.com> (last visited Aug. 30, 2004).

267. Stewart Mandel, *New BCS Boss Undaunted By Challenges* (Jan. 8, 2004), at [http://sportsillustrated.cnn.com/2004/writers/stewart\\_mandel/01/08/weiberg.bcs/index.html](http://sportsillustrated.cnn.com/2004/writers/stewart_mandel/01/08/weiberg.bcs/index.html). Thus, college football fans can be certain that the BCS does not have the final word on naming the national champion in Division I-A.

268. *See supra* note 2 (noting that the BCS will add a fifth bowl game after the 2006 regular season).

269. The essential facilities doctrine is invoked when access to an “essential facility” is denied by one competitor to another. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872, 881 (2004). “[W]here access exists, the doctrine serves no purpose.” *Id.* Lower courts crafted the essential facilities doctrine, but the Supreme Court has never recognized the doctrine. *Id.* (noting that the “[Court] find[s] no need either to recognize [the essential facilities doctrine] or to repudiate it here”). According to Phillip Areeda, the essential facilities doctrine has five elements: “(1) whenever competitors jointly create a useful facility, (2) that is essential to the competitive vitality of rivals, (3) and (perhaps) essential to

The federal antitrust laws are in place to judge competition, not the fairness of who was included and excluded from a particular business venture.<sup>270</sup> Courts have accepted the longstanding principle that the Sherman Act does not prevent a party from unilaterally determining the parties with whom it will deal and the terms under which the party will transact business.<sup>271</sup> Thus, the antitrust laws will not force the BCS to allow the non-BCS universities complete access to the BCS arrangement.<sup>272</sup>

Additionally, non-BCS schools are not completely excluded from the BCS, so any claim that the BCS arrangement constitutes a group boycott is legally flawed.<sup>273</sup> A classic group boycott<sup>274</sup> arises in a horizontal agreement where the accused boycotters possess market power or exclusive access to a market.<sup>275</sup> A crucial element to a horizontal group boycott claim is that an effort exists by one entity to exclude one or more of its competitors by "cutting them off from trade relationships which are necessary to any firm trying to compete."<sup>276</sup> In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*,<sup>277</sup> the U.S. Supreme Court held that a successful group boycott claim existed where the retailer induced wholesalers and manufacturers to refuse to supply its competitor. The Supreme Court cases

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the competitive vitality of the market, (4) and admission of rivals is consistent with the legitimate purposes of the venture, then (5) the collaborators must admit rivals on relatively equal terms." Phillip Areeda, *Essential Facilities: An Epithet In Need of Limiting Principles*, 58 ANTITRUST L. J. 841, 844 (1989) (emphasis omitted).

270. For example, suppose that Wal-Mart and Target decide to pursue a private business venture but opt not to include K-Mart in the project. K-Mart wants to file suit to gain access to the joint venture between Wal-Mart and Target. Absent application of the essential facilities doctrine, Wal-Mart and Target would have no obligation to allow K-Mart to join the agreement because the federal antitrust laws do not mandate forced access. Nothing prevents K-Mart, however, from pursuing other options, such as a joint venture with Sears.

271. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

272. See Areeda, *supra* note 269, at 852 ("There is no general duty to share. Compulsory access, if it exists at all, is and should be very exceptional. . . . No one should be forced to deal unless doing so is likely substantially to improve competition in the marketplace by reducing price or by increasing output or innovation.").

273. *Contra McConnell Senate Statement*, *supra* note 36, at 9 ("There is substantial evidence that the most powerful conferences and the most powerful bowls have entered into agreements to allocate the postseason bowl market among themselves and to engage in a group boycott of non-Alliance teams and bowls.").

274. A classic group boycott refers to a horizontal group boycott. The distinction is important because different rules apply for vertical group boycotts.

275. See Wallace, *supra* note 33, at 68.

276. *Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1160 (10th Cir. 1983) (*Bd. of Regents II*) (quoting LAWRENCE ANTHONY SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 91, at 260 (1977)).

277. 359 U.S. 207 (1959).

finding successful horizontal group boycott claims<sup>278</sup> all reflect conduct whereby one group induces the concerted action of others “to deprive competing firms of necessary trade relationships.”<sup>279</sup> No similar situation exists in the BCS arrangement. Simply because certain Division I-A teams are unsuccessful at making it to a BCS bowl does not turn the BCS arrangement into a group boycott. Further, the effort by BCS universities and conferences to foster a national championship game, as well as three other major bowl games, does not manifest a purpose to exclude other universities, as evidenced by the two available slots for any Division I-A school that qualifies to compete in a BCS bowl game.<sup>280</sup> Horizontal group boycott claims are properly restricted to concerted attempts by one competitor to exclude horizontal competition; a classic group boycott claim “should not be applied, and has never been applied by the Supreme Court, to concerted refusals that are not designed to drive out competitors but to achieve some other goal.”<sup>281</sup> Although some might argue that the BCS drives out other Division I-A universities, a court would likely reject this claim because the two at-large positions and the sharing of BCS revenues with non-BCS schools, regardless of their participation in a BCS bowl game, illustrate that no BCS member is interested in driving another university out of the football business.<sup>282</sup>

The BCS agreement exists not to insulate non-BCS schools from competition but to improve the entertainment product. Moreover, the BCS and its member institutions market competition, or more specifically, bowl games between universities, which provide exciting contests between the top institutions. This “product” would be completely nonexistent if there was no method for choosing the teams or defining the product to be marketed.<sup>283</sup> The actions of the BCS actually widen consumer choice, not only in terms of bowl games available to sports fans, but also the choices available to athletes, and should be viewed as procompetitive.<sup>284</sup> Without the BCS agreement, football teams would likely

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278. See *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961) (determining a group boycott existed where manufacturers coerced an adverse “seal of approval” decision with regard to the product of a competitor); *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941) (finding a group boycott where clothing manufacturers organized a boycott of retailers who dealt in the clothing of competing manufacturers).

279. *Bd. of Regents II*, 707 F.2d at 1161.

280. See *supra* notes 19-24 and accompanying text.

281. *Smith v. Pro Football, Inc.*, 593 F.2d 1173, 1180 (D.C. Cir. 1978).

282. See *Delany House Testimony*, *supra* note 1, at 10; REVENUE DISTRIBUTION, *supra* note 117.

283. See *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) (*Bd. of Regents III*).

284. See *id.* at 102.

continue to play bowl games according to their conference affiliations with certain bowl games. Consequently, the bowl system would face the same problem that plagued college football teams and fans before a bowl alliance — the possibility that certain conference and bowl relationships would prevent the crowning of a true national champion.<sup>285</sup>

Ironically, the non-BCS schools' arguments for access to the BCS in an antitrust suit would be strikingly similar to those justifications the NCAA proffered in *Board of Regents*, which were rejected by the U.S. Supreme Court. The NCAA's position was that the television contracts promoted *athletically balanced* competition.<sup>286</sup> The Tenth Circuit concluded that such a consideration amounted to an argument that "competition will destroy the market," a position entirely inconsistent with the policy of the Sherman Act.<sup>287</sup> Likewise, non-BCS schools contend that an open BCS arrangement will promote fairness and balanced competition.<sup>288</sup>

Non-BCS schools also claim that the revenue structure of the BCS, which predominately rewards BCS members, is problematic under the federal antitrust laws.<sup>289</sup> Although the concerns over the BCS revenue structure are troublesome,<sup>290</sup> these concerns are not novel to the courts, nor indicative of an antitrust violation. In response to the NCAA's similar concerns in using a member-wide television plan, District Judge Burciaga commented in *Board of Regents* that

[m]any less prominent schools seek to expand their football revenues beyond what they would receive in a non-cartelized market. . . . The NCAA's attempts to placate the prominent producers, such as Georgia and Oklahoma, have failed. These plaintiffs and others whose superior competitive practices have earned them prominence in the sport of college football wish to no longer suffer the economic injury visited upon them by the less prominent members of the cartel.<sup>291</sup>

In *Board of Regents*, the NCAA strenuously argued that increased revenues for universities like Oklahoma would give those universities an overwhelming

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285. *Delany House Statement*, *supra* note 1, at 13-14.

286. *Bd. of Regents III*, 468 U.S. at 97 (emphasis added).

287. *Id.* (quoting *Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1154 (10th Cir. 1983)).

288. *See Cowen House Statement*, *supra* note 4, at 19.

289. *Id.*; *Young House Testimony*, *supra* note 11, at 28.

290. *See supra* note 134 (discussing the potential Title IX implications of the BCS).

291. *Bd. of Regents of Univ. of Okla. v. NCAA*, 546 F. Supp. 1276, 1301 (W.D. Okla. 1982) (*Bd. of Regents I*).

advantage over other schools.<sup>292</sup> The NCAA contended that schools that failed to generate large revenues would never compete with the “power elite” of fifteen or twenty schools that would emerge in a free market situation.<sup>293</sup> The district court rejected this argument, finding that a “power elite” already existed because some teams are televised more often and produce far better television ratings than others.<sup>294</sup>

Ultimately, the non-BCS claims amount to concerns for fairness in athletic competition. Unfortunately for non-BCS universities, the Sherman Act protects economic competition, not fairness in athletic competition. Therefore, non-BCS schools should resort to other means besides the federal antitrust laws to redress their fairness claims.

### *B. Back to Basics in Antitrust Law: The Sherman Act's Purpose and Protections*

Antitrust law in the United States is not concerned with fairness.<sup>295</sup> Rather, antitrust law seeks to promote free enterprise and competition in the marketplace.<sup>296</sup> Although the BCS system may seem unfair, this alleged unfairness does not equate to an antitrust violation.

In the end, claims that the BCS violates federal antitrust law simply cannot stand when measured against the purpose of the Sherman Act.<sup>297</sup> The purpose

292. *Id.* at 1310.

293. *Id.*

294. *Id.*

295. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (stating that antitrust law is not about fairness); Eleanor M. Fox, *U.S. and European Merger Policy—Fault Lines and Bridges: Mergers That Create Incentives for Exclusionary Practices*, 10 GEO. MASON L. REV. 471, 478 (2002); Jennifer E. Gladieux, Comment, *Towards a Single Standard for Antitrust: The Federal Trade Commission's Evolving Rule of Reason*, 5 GEO. MASON L. REV. 471, 476 n.23 (1997) (“The main judicial dispute over antitrust's goals concerns whether antitrust should promote fairness or economic efficiency.”). *But see* Daria Roithmayr, *Barriers To Entry: A Market Lock-In Model of Discrimination*, 86 VA. L. REV. 727, 799 (2000) (identifying the main issue in antitrust law as economic efficiency). “[M]any conservative antitrust scholars reject competitive fairness and the equality of calculus. The fairness argument seems to have prevailed in earlier decisions such as *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). However, more recent decisions show that maximizing consumer welfare (economic efficiency) is the primary goal of the antitrust laws.” *Id.*

296. See 1 EARL W. KINTNER, *FEDERAL ANTITRUST LAW* § 1.1, at 1 (1980).

297. District Judge Burciaga in *Board of Regents* recognized that

[t]he basic policy of the Act is that *economic competition* be unrestrained. The policy rests on the premise that “the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and

of antitrust analysis is not to decide whether a certain policy is in the public's best interest or even in the best interest of the members of an industry.<sup>298</sup> Rather, the court's purpose in antitrust cases is to determine whether the competitive restraint hinders economic competition, in the sense that it unreasonably prevents members of the industry from competing.<sup>299</sup>

The BCS might not be in the best interest of Division I-A universities because the BCS creates a class system in college football, more aptly referred to as the "haves" and "have-nots" of college football. Moreover, the BCS might not be in the best interest of the public because the public might rather have the excitement generated by a playoff structure, where Cinderellas can live their dreams, and anyone can win at the end of the day. But the actions of the BCS do not support an antitrust lawsuit. The purpose of the Sherman Act clearly reveals that the Act focuses on competition, not individual competitors. Unfortunately, for critics who would like to see the BCS system destroyed, the Sherman Act will not provide that remedy.

### *C. Distinguishing Economic and Athletic Competition Under the Sherman Act*

Non-BCS universities' claim that the BCS is fraught with antitrust violations "confuse[s] economic competition . . . with athletic competition that is staged for purposes of entertainment."<sup>300</sup> The BCS is athletic competition staged for the purpose of entertaining college football consumers. Courts have distinguished between athletic competition and economic competition on several occasions. For example, in *Baseball at Trotwood, LLC v. Dayton Professional Baseball Club*,<sup>301</sup> the plaintiffs were seeking to join the league, rather than to compete with the league in an economic sense.<sup>302</sup> The court found that other courts have held that sports leagues do not violate federal antitrust laws simply by declining to admit a prospective new member.<sup>303</sup> Distinguishing athletic and

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social institutions." The court is not allowed to determine whether competition is the wisest policy in any given industry, because Congress has determined that free and open competition shall be the rule of commerce in our nation. Arguments describing the ruinous effect of competition in a particular industry are to be addressed to Congress, *not* to courts.

*Bd. of Regents I*, 546 F. Supp. at 1304 (emphasis added) (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958)).

298. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

299. *Id.*

300. *Toscano v. PGA Tour, Inc.*, 201 F. Supp. 2d 1106, 1122 (E.D. Cal. 2002).

301. 113 F. Supp. 2d 1164 (S.D. Ohio 1999).

302. *Id.* at 1172.

303. *Id.* at 1171-72.

economic competition, the *Trotwood* court held that the plaintiffs did not suffer antitrust injury by the league's refused admission because the refused admittance did not reduce economic competition between members of the league.<sup>304</sup>

Similar to the plaintiffs in *Trotwood*, the non-BCS schools want to join the BCS so that they may reap the full benefits of BCS bowl games. Under *Trotwood's* reasoning, however, the BCS does not violate antitrust laws simply because prospective members are denied entry. Non-BCS schools' claims ultimately confuse economic competition, which is what the Sherman Act protects, with athletic competition, whose winners are chosen on the playing field.

### VI. Conclusion

John Heisman once said: "When in doubt, punt!" Advocates of an antitrust lawsuit against the BCS should wholeheartedly take Heisman's advice and punt on pursuing a lawsuit against the BCS. If non-BCS schools are seeking to improve competition on the football field, an antitrust lawsuit is the wrong game plan.

Few would deny that the BCS has serious problems and limitations. However, the inequities of the BCS do not equate to a successful lawsuit under the Sherman Act. Although the Sherman Act will not provide a legal remedy to non-BCS schools, not all is lost in their effort to capture national attention.

With press coverage, congressional hearings, and law review articles, the BCS remains an important topic. Such attention has created contempt for this inequitable system and should fuel the fire under non-BCS schools. Although the courtroom does not provide the proper setting for resolving this dispute, several options exist for non-BCS schools — from further negotiations with the BCS and the NCAA, to congressional leveling of the Division I-A college football playing field.

This comment does not seek to determine whether the best solution for the BCS is adding another bowl game or transitioning the bowl game postseason into a playoff system. Rather, in punting on the antitrust lawsuit, non-BCS schools should stay in the game and tackle this unique opportunity by negotiating and changing the system that has caused so much controversy.

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304. *Id.* at 1172.



